Petition

No. 81-1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

The publicity proviso exception to the secondary boycott prohibitions of the National Labor Relations Act (the "Act"), 29 U. S. C. § 158(b)(4)(i)(ii)(B), permits a union to publicize a labor dispute by means other than picketing provided that the publicity relates to a "product" or "products" which have been "produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." The question presented is whether, notwithstanding the limitations of this proviso, a union may handbill urging a consumer boycott of the owner of a neutral shopping center and all of its neutral tenants simply because that union has a labor dispute with one of the contractors who is doing business with one of the tenants.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The Edward J. DeBartolo Corp., ("DeBartolo"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 20, 1981.

OPINIONS BELOW

The divided opinion of the Court of Appeals is reported at 662 F. 2d 264 (A. 1-18). The decision and order of the National Labor Relations Board is reported at 252 NLRB 702 (1980) *sub nom. Florida Gulf Coast Building Trades Council, AFL-CIO* (A. 19-30).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit enforcing the decision of the Board was issued on October 20, 1981 (A. 31-32). A timely petition for rehearing was denied on January 26, 1982 and this petition was filed within ninety days of that date (A. 33-34). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.*, is set forth below.

> Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—(4)(i) to engage in, or induce or encourage any individual employed by any person . . . to engage in, a strike or refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is. . . .
>
> * * *
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . . .
>
> * * *
>
> Provided . . ., That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . .

STATEMENT OF THE CASE

DeBartolo owns and operates East Lake Square Mall, a large shopping center located in Tampa, Florida. One of the Mall's approximately eighty-five tenants is the H. J. Wilson Company, Inc. ("Wilson's"). The primary labor dispute in this case is between High Construction Company ("High"), a building contractor engaged to construct a new department store for Wilson's at the Mall, and the Florida Gulf Coast Building Trades Council, AFL-CIO (the "Union").

After construction commenced the Union concluded that High was paying substandard wages and inadequate benefits to its employees. In order to publicize its discontent with this situation, the Union handbilled at all the entrances to the Mall in late 1979 and early 1980. The handbill urged a total consumer boycott of the Mall and all of its tenants.[1] Neither DeBartolo nor the tenants had participated in any way with the selection of High by Wilson's. They had no control over either the method or means by which Wilson's, let alone High, did business. Nor were DeBartolo or the tenants in any way responsible for the wages and benefits paid by High or, apart from DeBartolo's standard lease with Wilson's, did they have any type of a business relationship with either High or Wilson's.

Following DeBartolo's subsequent unfair labor practice charges, the Board's General Counsel issued a complaint alleging that the handbilling constituted a secondary boycott prohibited by Section 8(b)(4) of the Act. The Board, relying on its decision in *United Steelworkers of America and Pet, Incorporated*, 244 NLRB 96 (1979) and this Court's decision in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46 (1964), dismissed the complaint on the ground that the activity came within the ambit of the publicity proviso exception to that Section. On appeal to the Fourth Circuit, the Board's decision was enforced although,

[1] The handbill is reproduced in its entirety at A. 23-24.

in the interim, the Eighth Circuit had disagreed with the Board in *Pet (Pet, Incorporated* v. *N.L.R.B.*, 641 F. 2d 545 (1981)) and "construed . . . the publicity proviso in a rather different fashion." (A. 13) The majority decision below, however, expressly "differ[ed] with the reasoning and conclusions of the Eighth Circuit majority in *Pet* and . . . [found] more persuasive the reasoning of the dissent [in that case]." (A. 14) The dissent below disagreed; it concluded that the majority opinion "require[d] a strained construction of the statute," (A. 18) that *Servette* was "factually distinguishable," (A. 18) and that the *Pet* majority was correct. The dissent, therefore, would have remanded the case to the Board, as did the Eighth Circuit in *Pet,* to consider "whether the handbilling is an unfair labor practice . . . or whether it is free speech protected by the first amendment . . . matters not addressed by the Board." (A. 18). A subsequent petition for rehearing *en banc* was denied, with Judges Russell, Widener, Murnaghan and Chapman in favor of granting the petition.

REASONS FOR GRANTING THE WRIT

The sole question presented by this petition is whether the producer-distributor requirement of the publicity proviso should be given the "generous interpretation" (A. 11) accorded by the majority below and the Board, which would protect handbilling "even where there is no direct connection between the primary employer and the handbilled employer," (A. 12) or whether that definition miscontrues the Act, as *Pet* and the dissent below concluded, since it is "totally at odds with any normal interpretation of the word 'produce' " (A. 18) and would sanction handbilling even where there was only a "highly attenuated" relationship (A. 18).

A failure to resolve this conflict would occasion a substantial dislocation in the administration of the Act. As one Board

member recently observed,[2] secondary consumer boycotts, such as that involved here, have now "replaced" or "substantially supplemented" the primary strike, "at least with regard to the most bitter labor-management disputes," as a "union's ultimate weapon." According to the President of the AFL-CIO, however, the barriers heretofore placed on the use of this weapon have had the "greatest impact" and created "the biggest single impediment to organization than anything else."[3] These restrictions were, nevertheless, the very intent of Congress when it enacted Section 8(b)(4); as this Court unanimously reiterated again this month, where the effect of "understandable and even commendable" union secondary boycott actions is "to impose a heavy burden on neutral employers ... [i]t is just such a burden, as well as widening of industrial strife, that the secondary boycott provisions were designed to prevent."[4] The resolution of the issue involved in this case—addition of "a large and undefinable exception to the statute"[5]—is an important and recurrent question which warrants resolution by this Court.

A. The 1959 Landrum-Griffin amendments to the Act were adopted to effectuate the Congressional intent underlying

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[2] Zimmerman, *The Changing Arsenal of Economic Weapons; Consequences for Section 8(b)(4), The Board And The Courts,* (remarks before the 1981 New York University National Conference on Labor), reprinted at 117 Daily Lab. Rep. D-1 (June 18, 1981).

[3] Sevrin, *Interview With Lane Kirkland,* N.Y. Times, Nov. 16, 1981, at 12, col. 4.

[4] *International Longshoremen's Assn.* v. *Allied International,* ____ U. S. ____, No. 80-163, 76 Daily Lab. Rep. D-1, D-4 (April 20, 1982); see also, *e.g., N. L. R. B.* v. *Denver Building and Construction Trades Council,* 341 U. S. 675, 692 (1951) ([Section 8(b)(4) was enacted to] "shield ... unoffending employers and others from pressures in controversies not their own").

[5] *International Longshoremen's Assn.* v. *Allied International,* ____ U. S. ____, No. 80-163, 76 Daily Lab. Rep. D-1, D-4 (April 20, 1982).

Section 8(b)(4) by closing various loopholes that had frustrated that intent.[6] The publicity proviso to that Section was a compromise between the original House bill which would have forbidden all secondary boycotts, the Senate version which exempted all forms of publicity, and President Eisenhower who, in a radio and television broadcast prior to the convening of the conference committee, demanded that Congress outlaw all picketing which caused a secondary boycott: the proviso permits truthful publicity, other than picketing, for the limited purpose of "inducing customers to boycott an unfair *product* or a *distributor* who does business with an unfair producer."[7] This intent to limit secondary pressure to only those employers who distribute the product of an employer engaged in a primary dispute is also reflected in both the statements of the legislators who enacted the proviso into law[8] and the fact, that, as this Court observed in *Servette*, Congress was familiar with the usage of the term "produced" in other labor laws such as the Fair Labor Standards Act, 29 U.S.C. § 203(j).[9] Following the

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[6] See, *e.g.*, *N.L.R.B.* v. *Servette, Inc.*, 377 U. S. 46, 51-54 (1964); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 270-274 (1959); and Comment, *Publicity Under Section 8(b)(4) of the Labor Management Reporting and Disclosure Act*, 80 Dick. L. Rev. 768, 770-774 (1976).

[7] Cox, *supra* note 6, at 274 (emphasis added).

[8] See, *e.g.*, the remarks of Sen. Kennedy, the chairman of the conference committee, at II Legislative History of the Labor Management Reporting and Disclosure Act of 1959 ("Leg. Hist."), at 1432 (Sept. 3, 1959) and 1721 (Sept. 4, 1959); the Report to the House of Major Changes Made In Griffin-Landrum Bill by Conference Committee, II Leg. Hist 1720 (Sept. 4, 1959); remarks of Rep. Hagen, II Leg. Hist. 1818 (Sept. 14, 1959); remarks of Rep. MacDonald, II Leg. Hist. 1810 (Sept. 8, 1959); remarks of Rep. Pucinski, II Leg. Hist. 1820 (Sept. 14, 1959); and remarks of Sen. Goldwater, II Leg. Hist. 1857 (Sept. 14, 1959).

[9] 377 U. S. at 55-6. The FLSA definition, while it gave the term

(Footnote continued on following page)

adoption of the publicity proviso—for two decades prior to its decisions in *Pet* and the instant case—the Board complied with this Congressional intent.[10] The Board's new approach, approved by the court below, would now emasculate that settled principle and, in effect, delete the "producer" limitation from the proviso.

(Footnote continued from preceding page)

"producer" a "broader reach" than that of a processor or manufacturer, did not, however, include the numerous other types of relationships encompassed by the decision below. See, *e.g.*, *Wilson* v. *Reconstruction Finance Corp.*, 158 F. 2d 564 (5th Cir. 1946) (employees of a company which constructs dwellings for employees of an employer engaged in commerce are "not engaged in the production of goods for commerce" notwithstanding that their activities "benefited the housing occupants"); *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2nd Cir. 1948) (employee who prepared plans for construction of an Army base is not engaged in the production of goods for commerce); and *Mitchell* v. *Five Boro Construction Corp.*, 14 WH Cases 720 (D. P. R. 1960) (employees engaged in the construction of various military buildings which will require additional work before final use are not engaged in the production of goods for commerce).

[10] Initially there was a disagreement as to whether the primary employer had to physically create a tangible good rather than in some other way add his labor to the production of a product. In *International Brotherhood of Teamsters, Local No. 537 (Lohman Sales Co.)*, 132 NLRB 901, 907 (1961), the Board adopted the latter position, holding that since a wholesaler also " 'handled' the raw materials of the product" and added "his labor in the form of capital, enterprise and service to the product he furnishes the retailer," he was a "producer" for purposes of the publicity proviso. This Court's decision in *Servette* reached the same conclusion in a dispute involving another wholesaler. Subsequently, the Board repeatedly reiterated this view: that "labor is the prime requisite of one who 'produces', and therefore an employer who applies his labor to a product, whether of an abstract or physical nature, or in the initial or intermediate stages of the marketing of the product, is one of the 'producers' of the product." *Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705 (1961).

In *Pet*, as the result of a dispute with Hussman, one division of the Pet conglomerate, a union handbilled urging the public to boycott all Pet products. The Board concluded that the handbilling was protected by the publicity proviso because Hussman "produced" the products of all the Pet subsidiaries by contributing capital, good will, and other economic support to the entire Pet enterprise. This reasoning, the Eighth Circuit majority concluded, improperly expanded the protection of the proviso. There were no direct business dealings between Hussman and Pet or its other subsidiaries, Hussman did not work on any of the products of Pet, and the employers were not tied together in any other way in the producer-distributor chain.

Even if *Pet* was correctly decided by the Board, the present case was not: it represents a significantly broader application of the Board's new interpretation of the proviso. There is no legal or financial relationship, even the limited one that existed in *Pet*, between High and DeBartolo or certainly between High and the other Mall tenants. There is no income generated by High, even under the nebulous definition of *Pet*, which inures to the benefit of DeBartolo or the other tenants. And neither DeBartolo or the other tenants have any influence or control over High's agreement with Wilson's similar to that which Pet could conceivably apply to the contractual arrangements of Hussman. Accordingly, the handbilling sanctioned by the Fourth Circuit in this case encompasses a far more attenuated relationship which is even less compatible with the language of the proviso than that disapproved by the Eighth Circuit in *Pet*.

Review by this Court is necessary, therefore, to resolve a conflict between the circuits and avoid an undesirable lack of uniformity in the administration of the Act.

B. Certiorari is also warranted to provide needed guidance on the proper interpretation of this Court's decision in *Servette*. The Board and the court below agreed with the dissent in *Pet* which concluded that *Servette* "compel[s] the conclusion that

the publicity proviso applies to *all* pure publicity that would otherwise come under the coverage of § 8(b)(4)(ii)(B).... No other conclusion is consistent with the *Servette* understanding that the publicity proviso is just as broad as the prohibition on secondary activity." 641 F. 2d at 552-3 (dissenting op.; emphasis the Court's). The *Pet* majority and the dissent below conversely deemed *Servette* distinguishable because this Court was "not there considering a case in which the primary-subsidiary's products and services were unrelated to the secondary-parent's products." 641 F. 2d at 549. The instant case provides a desirable vehicle for this Court to clarify the meaning of *Servette*.

C. In the absence of guidance by this Court, the Board's new approach to the proviso presages considerable litigation before the Board and the courts. As Board Member Zimmerman has indicated, the secondary boycott is the emerging weapon in the union arsenal: while many employers today can and do operate in the face of a strike, "no company can continue to operate for very long without customers." As a result, a union that undertakes a successful consumer boycott "often applies greater pressure in support of its demands than by pulling employees out on strike.... Witness the examples of Farah and J. P. Stevens.... *Pet* [or the present case] is not a sport case, but a harbinger of the type of activity to which unions will more and more turn in efforts to carry their case to the public and solicit consumer support for their demands."[11] Member Zimmerman expressed the hope, therefore, that the split between the circuits "may hasten Supreme Court review to settle the matter—a devoutly to be wished consequence."[12]

The ramifications of the instant case are far-reaching. If the contractor of one shopping center tenant is related to the shopping center enterprise as a "producer," than any other

[11] Zimmerman, *supra* note 2, at D-1, D-4.

[12] *Id.* at D-4.

employer who does business with the center owner or any tenant is similarly related. Any labor dispute involving the bank that loans money, the scavenger service that collects refuse, the carrier that provides insurance coverage, the printer that prepares literature or an endless list of other companies that do business—large or small, continuing or occasional—with any one tenant could be extended to the shopping center owner and the other tenants. In the case of super-regional shopping centers the number of potential employers who could become involved is substantial. In Woodfield Mall near Chicago, for example, there are some 230 tenant stores, ranging from large department stores such as Sears and Lord & Taylor to small specialty stores such as the Puppy Palace and The Tinder Box.[13]

Moreover, the relationship between the common tenants of an office building or industrial park can be equated to the relationship between the parties engaged in a shopping center enterprise. Likewise, the varied sales and service establishments that do business on a common commercial street also have a mutually beneficial relationship: each attracts consumers who will do business with the other stores; they may all belong to a merchant association which engages in promotional and advertising activities of the same type as the tenants of a shopping center; they may all be parties to an arrangement to provide for security, sanitation and similar services; and they may frequently all belong to local chambers of commerce because of a wide variety of shared interests. Presumably, therefore, under the decision in this case, if any single store became engaged in a labor dispute, that controversy could be extended to all of the other establishments who occupy the same building or who are located in the same industrial park or who front the same thoroughfare. The Board's reasoning

[13] *Mall Talk-The Selling of the Presents 1980,* TWA Ambassador, pp. 21-22 (December 1980).

would also presumably apply to any type of establishment in the same geographic area; for example, the opening of a new ski resort would benefit local ski shops or the presence of a new factory would conceivably benefit local merchants in much the same manner as the other shopping center tenants at the Mall would be benefited by a functioning Wilson's. The uncertain status of the publicity proviso encourages union boycott activity and corresponding litigation in all of these areas pending this Court's resolution of the unanswered questions. Until that time, as stated by Board Member Zimmerman, "the Board must apply a convoluted statute that has been muddled and distorted by judicial interpretation" to decide "difficult questions . . . [of] considerable importance."[14]

D. Granting the instant petition may also obviate the need for the Board to resolve the questions remanded to that agency by *Pet*,[15] issues which that Court noted are "not trivial and are not free from difficulty" (641 F. 2d at 550) and which involve "fundamental labor relations issues . . . in [a] sensitive area" (*Id.* at 552 [dissenting op.]). These questions place the Board, as acknowledged by Member Zimmerman, "into a tight corner."[16] Depending on the Board's resolution of these issues, it may also have to decide the difficult First Amendment question of whether, if the Union's handbilling is prohibited by the Act, its constitutional rights would then be violated. 641 F. 2d at 550. None of these questions need be addressed, however, if this Court agrees with the decision below.

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[14] Zimmerman, *supra* note 2, at D-4.

[15] These questions are "whether Pet and its subsidiaries are separate 'persons' from Hussman for purposes of Section 8(b)(4), and whether the Union's publicity fell within the prohibition of Section 8(b)(4)(ii). . . ." 641 F. 2d at 549-550.

[16] Zimmerman, *supra* note 2, at D-4.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

The EDWARD J. DeBARTOLO CORPORATION, Petitioner.

The American Retail Federation, The Chamber of Commerce of the United States of America, Amici Curiae,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Florida Gulf Coast Building Trades Council, Intervenor,

Building and Construction Trades Department, Amicus Curiae.

No. 80-1745.

United States Court of Appeals, Fourth Circuit.

Argued June 3, 1981.

Decided Oct. 20, 1981.

Before BUTZNER and ERVIN, Circuit Judges, and BRITT,* District Judge.

ERVIN, Circuit Judge:

The Edward J. DeBartolo Corporation (DeBartolo) petitions this court to review and set aside an order of the National Labor Relations Board (the Board) dismissing a complaint alleging that the handbilling activity of the Florida Gulf Coast Building Trades Council, AFL-CIO (the Union) at one of DeBartolo's shopping malls violated federal labor laws. Upon review, we deny the petition.

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* The Honorable W. Earl Britt, United States District Judge for the Eastern District of North Carolina, sitting by designation.

I. *Background*

DeBartolo, an Ohio corporation doing business in several states,[1] owns and operates East Lake Square Mall in Tampa, Florida. The mall is fairly large, having over eighty tenants, and it is with one of its larger tenants—the H. J. Wilson Company, Inc. (Wilson's)—that this labor dispute had its origins.

DeBartolo entered into a land lease with Wilson's, whereby Wilson's agreed to build a department store in the mall. Wilson's in turn hired H. J. High Construction Company (High) to construct the store. After construction had commenced, the Union became embroiled in a primary labor dispute with High over the payment of allegedly substandard wages and the provision of inadequate benefits to its employees. In order to publicize its discontent with the situation, the Union handbilled at the entrances to the mall in 1979 and early 1980, ceasing only after the issuance of an injunction by a Florida state court. The Union passed out the handbills in an orderly manner and did not picket.

The handbills, requesting a total consumer boycott of the mall, read:

PLEASE *DON'T SHOP AT EAST LAKE* PLEASE
SQUARE MALL

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard

[1] This court has jurisdiction pursuant to 29 U.S.C. § 160(f), as DeBartolo "transacts business" in Maryland by virtue of the operation of a mall and a shopping center there.

wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

A few days after the Union commenced its handbilling, DeBartolo filed unfair labor practice charges. The Board's General Counsel then issued a complaint alleging that the handbilling urged a secondary boycott in violation of section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(b)(4)(ii)(B), which makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain

any person engaged in commerce or in an industry affecting commerce, when an object thereof is to force or require any person to cease doing business with any other person. The Union filed a timely response denying commission of an unfair labor practice, and upon joint motion of the parties, a hearing before an Administrative Law Judge was waived, with the Board making findings and conclusions upon a stipulated record.

The Board dismissed the complaint on the ground that the activity came within the ambit of the statute's "publicity proviso," which exempts from the statute's proscription

> publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution[.] 29 U.S.C. § 158(b)(4).

Observing that no allegations had been made that the handbilling had the unlawful effect of inducing any individual employed by anyone other than High to refuse to work and concluding that the record established that the handbills were truthful and that the statutory requirement of a "producer-distributor" relationship had been met, the Board determined that the handbilling was protected publicity. On appeal DeBartolo raises three arguments against the Board's conclusions, each of which will be considered in turn.[2]

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[2] DeBartolo states in its brief that the Wilson's store has been completed and that High is no longer performing work at this location. We do not, however, consider the case moot. In labor cases,

Footnote continued on next page.

II. *Truthfulness of the Handbills*

DeBartolo first argues that the publicity proviso cannot shield the handbilling because one of the prerequisites to its application is that the message conveyed be truthful. The message of the handbills was untruthful, DeBartolo asserts, in three instances: (1) it urged a consumer boycott of all the stores in the mall, including those that were totally neutral; (2) it gave the erroneous impression that High was a "producer" of the products of DeBartolo and the mall's tenants other than Wilson's; and (3) it failed to identify High, the primary employer, by name.

These arguments were raised in briefs submitted to the Board, and the Board concluded that the first two contentions addressed legal issues unrelated to the truthfulness requirement and relevant instead to the proviso's "producer-distributor" requirement. We agree and hold our discussion of those issues in abeyance for Part III of the opinion.

The third contention the Board found relevant. It concluded, however, that the Union did not substantially depart from fact or intend to deceive by omitting High's name when it stated that it believed that Wilson's department store was being built by "contractors who pay substandard wages and fringe benefits." In so concluding, the Board relied upon the truthfulness test it had set forth in *Local 537, International Brotherhood of Teamsters (Lohman Sales Co.)*, 132 N.L.R.B. 901, 906 (1961), in which it stated that the publicity proviso "does not require that a handbiller be an insurer that the content of the handbill is 100 per cent correct, and that where . . . there is no evidence of an intent to deceive and there has not been a

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cessation of the challenged conduct does not assure that the underlying controversy will not be reopened or that the challenged conduct will not reoccur. *See NLRB v. Raytheon Co.*, 398 U.S. 25 (1970); *Pet, Inc. v. NLRB*, 641 F.2d 545, 545 n.1 (8th Cir. 1981).

substantial departure from fact, the requirements of the proviso are met."

The Board correctly applied the *Lohman Sales* standard to the facts of this case. Omission of High's name in the handbill is, standing alone, not evidence of an intent on the Union's part to deceive the public about the labor dispute and does not, in any sense, depart from fact. Indeed, to hold otherwise would be tantamount to imposition of a per se requirement that the name or names of primary employer or employers appear in the handbills. This we will not do, in light of the Board's reluctance to make the statutory truthfulness requirement more stringent than its current expression in *Lohman Sales* and the dubious benefits to the public of such a rule. We therefore uphold the Board's conclusion that the handbill's message was a truthful one.[3]

III. *Producer-Distributor Relationship*

The second argument advanced by DeBartolo is that the publicity proviso did not protect the handbilling because the producer-distributor relationship required by the proviso did not exist between High and DeBartolo, and DeBartolo and the mall's tenants; it asserts that only the relationship between High and Wilson's can qualify as one between a producer and a distributor. We disagree and uphold the Board's conclusion that this relational requirement was fulfilled.

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[3] Board Member Penello dissented from the Board's decision in this case because he found the stipulated record to be an insufficient basis upon which to decide the question of the handbill's truthfulness. He would have remanded the proceeding for a hearing on what he perceived to be factual questions surrounding the truthfulness issue.

We think that the Board majority acted properly in determining the issue. Application of the *Lohman Sales* test in this case required only legal determinations, i.e., whether omission of High's name from the handbill was evidence of intent to deceive, and whether the omission represented a substantial departure from fact. Remand was therefore not necessary.

The proviso protects truthful publicity that advises the public "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." In considering the proviso's producer-distributor requirement in the context of this case, the Board first traced the mutually beneficial relationship between, and interdependence of, DeBartolo and the mall's tenants, as evidenced by the terms of their lease agreements. It found that each tenant agreed to use its premises in a way that would not injure the mall's reputation or interfere with other tenants' businesses; that each tenant had to pay its share of the operating, maintenance, and repair costs for the mall's common areas, with its share to be reduced every time a new tenant moved in; that a tenant's minimum rent would increase by ten per cent when new department stores of certain size opened at the mall; that each tenant was required to join the mall's merchants' association and to take part in joint advertising projects; that DeBartolo would share in the commercial success of the mall by collecting from tenants percentage rents based on sales; and that DeBartolo had the right to exercise control over tenants' construction work, business hours, employees, signs, and equipment.

The terms of the lease agreements, in the Board's judgment, reflected "the symbiotic nature of the relationship between DeBartolo and its tenants." The symbiosis, in turn, supported the Board's conclusion that not only the High-Wilson's relationship but also the High-DeBartolo relationship and the relationship between High and the mall's tenants could be described as that of producer and distributor.

The Board concluded that High is a producer of the Wilson's store at the mall because, by its employees' labor, it adds value to the store. High is also a producer of the mall enterprise itself because, by helping to build the Wilson's store, it has applied capital, enterprise, and service to the mall enterprise and has thus added value to that enterprise. Both the

Wilson's store and the mall enterprise itself, therefore, are products of High's labor.

Although the Board does not elaborate, its reasoning suggests that it considered DeBartolo and the mall's tenants to be distributors of both of High's products. DeBartolo and the tenants help "distribute" the new Wilson's store and its inventory by attracting shoppers, helping to maintain common areas, and participating in joint advertising. They help "distribute" the mall enterprise and the goods sold through that enterprise simply by conducting business.

In reviewing the Board's resolution of the producer-distributor issue, which presents mixed questions of law and fact, we are mindful of the limitations upon that review; we are to "accord great respect to the expertise of the Board when its conclusions [on a mixed question of fact and law] are rationally based on articulated facts and consistent with the Act." *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980). The Board's construction of a labor statute, if reasonably defensible, moreover, should not be rejected merely because the courts might prefer another view of the statute. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979), citing *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335, 350 (1978). Indeed, that construction is entitled to considerable deference. *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Iron Workers*, 434 U.S. at 350. With these cautionary instructions in mind, we conclude that the Board's reasoned conclusions on the meaning and application of the producer-distributor language are rational and consistent with the proviso language. *See NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

Board and judicial interpretation of the producer-distributor language, based in large part upon the legislative history of the proviso, clearly indicates that the language is not to be read literally but instead is to be broadly construed. In its

leading decision *Lohman Sales*, the Board concluded that a wholesale distributor of cigarettes and other commodities—a middleman—was a producer of those goods within the meaning of the proviso because it added the value of its labor to these goods in the form of capital, enterprise, and service. In reaching that conclusion, the Board reviewed the legislative history of the proviso and decided that the words "product" and "produced" were not meant to be words of special limitation. Rather, it concluded that labor is the key characteristic of one who produces and, accordingly, that the Board need not attempt "to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled." 132 N.L.R.B. at 907. *See Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 N.L.R.B. 1698 (1961) (radio station is producer of products it advertises).

The Supreme Court approved the *Lohman Sales* decision and rationale in *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964). The *Servette* Court reviewed the legislative history of the proviso and the Board's *Lohman Sales* decision and concluded that Servette, as a wholesale distributor of specialty merchandise stocked by food chains, was a producer of that merchandise for purposes of application of the publicity proviso. In so holding, the Court noted that

> [t]he proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded . . . . It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. . . . There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception,

> and we see no basis for attributing such an incongruous purpose to Congress. *Id.* at 55.[4]

Other courts have applied the *Servette* rationale to give the proviso a similarly expansive scope. *See, e. g., Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir. 1966) (television station, by virtue of its advertisement of goods and services, was a producer of those goods and services, even though court found incongruous the idea of a service being a product which is distributed).

These decisions—handed down soon after the 1959 passage of the proviso—quite clearly show that the proviso's producer-distributor language was not to be given a narrow or literal construction, for such an interpretation would often defeat its clear purpose of protecting labor's ability to publicize by means other than picketing its grievances to consumers. Economic realities made a broad reading necessary; employees

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[4] As the Court made clear in *Servette* and in the companion case *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), the publicity proviso resulted from a compromise between the House of Representatives and the Senate in amending section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), in 1959. The proviso was incorporated into the statute, even though it protected some coercive activity, because of the Senate's concern that the right of unions to exercise free speech and to appeal to the public be protected and that the revised section 8(b)(4) not offend the first amendment. When the Senate passed the compromise bill, Senator John Kennedy, who had presided over the conference committee, stated that the proviso preserved the right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

> . . . We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop . . . and carry on all publicity short of having ambulatory picketing . . . . 105 Cong.Rec. 17898-99 (1959).

work not only to produce tangible products but also to provide services and to add value to goods not directly produced by them.

In no area has a generous interpretation of the language been more necessary than in the construction industry, as a construction company obviously does not produce tangible goods that are then literally distributed by a secondary employer. The Board has, accordingly, given liberal interpretation to the proviso in this context and has consistently held that construction contractors and subcontractors are producers within the meaning of the proviso and that their services are products, *see Plumbers and Pipefitters Local Union No. 142 (Shop-Rite Foods, Inc.)*, 133 N.L.R.B. 307 (1961); *Local 712, IBEW (Golden Dawn Foods)*, 134 N.L.R.B. 812 (1961), and that they are also producers of the "end product" to which their services contribute. *See Local 73, Electrical Workers Union (Northwestern Construction of Washington, Inc.)*, 134 N.L.R.B. 498 (1961).[5]

As labor cases involving shopping center construction arose, the Board continued to give broad definition to the producer-distributor language of the proviso. In *Local Union No. 54, Sheet Metal Workers (Sakowitz, Inc.)*, 174 N.L.R.B. 362 (1969), the Board held that a union's handbilling of certain downtown stores was protected under the proviso. The handbills asked for a consumer boycott of those stores because the heating and air conditioning subcontractor at a suburban shopping center at which the stores had leased space was paying substandard wages. The Board's conclusion allowed the stores to be handbilled even though they themselves had not hired the subcontractor and had no relationship with it except

[5] In a different procedural setting, a district court has reasoned in like manner and refused to enjoin handbilling by a union at a retail store owned by persons who had a financial interest in a construction project at which employees allegedly worked under substandard conditions. *Squillacote v. Building and Construction Trades Council*, 266 F.Supp. 971 (E.D.Wis. 1967).

to pay for its services as part of their monthly rent. In *Nashville Building & Construction Trades Council (Castner-Knott Dry Goods Store)*, 188 N.L.R.B. 470 (1971), the Board reasoned in similar fashion. In that case, simultaneous picketing and handbilling at a downtown store urging a consumer boycott because of that store's contract with an out-of-state nonunion construction company to build a new store for it at a shopping mall was held to be illegal secondary activity. Handbills had been earlier distributed at that store and others which planned to locate at the mall, however, requesting that consumers boycott those stores because the mall's owner had hired nonunion contractors to construct the mall, and no argument was made that those handbills were outside the scope of the proviso. In these shopping center cases it can be inferred that the construction contractors and subcontractors were producers of a certain work product and that the shopping center's stores were distributors of that product and thus could be handbilled by unions urging a total boycott of their businesses.

In light of precedent, the Board's interpretation and application in this case of the publicity proviso is clearly consistent with the Act and is rational. High produces certain products, i. e., the Wilson's store and the mall enterprise, and those products are in turn distributed by DeBartolo and the mall tenants, all of whom had a financial interest in High's work but had no direct relationship with High. That DeBartolo and the mall tenants are not involved in the primary dispute between High and Wilson's does not alter the conclusion: it was clearly Congress's intent to allow coercive pressure of neutral employers in the forms of union handbilling of consumers and other pure publicity. *See NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. at 69-70. Furthermore, that High had no contract with either DeBartolo or the mall tenants is not of major significance; the handbilling should be protected under the publicity proviso even when there is no direct connection between the primary employer and the handbilled employer. *See, e.g., Local Union No. 54, Sheet*

Metal Workers (Sakowitz, Inc.), 174 N.L.R.B. 362 (1969). High thus does not have to be contractually related to DeBartolo and the mall's tenants for DeBartolo and the tenants to be able to respond to union handbilling and, in turn, to apply pressure on Wilson's and High. We therefore uphold the Board's conclusion that the proviso's requirement of a producer-distributor relationship was met in this case.[6]

The Eighth Circuit in *Pet, Inc. v. NLRB*, 641 F.2d 545 (1981), has construed the producer-distributor requirement of the publicity proviso in a rather different fashion. In that case, the court reversed the Board's dismissal of Pet's complaint alleging that the United Steelworkers had engaged in an illegal secondary boycott. The union had struck one of the plants of Hussmann, a wholly owned subsidiary of Pet, and had also run advertisements in local newspapers and had handbilled in the St. Louis area urging the public to boycott Pet products and other Pet subsidiaries. The Board concluded that the union's handbilling and advertising activities were protected by the publicity proviso, because Hussmann, by its application of capital, enterprise, and service to Pet and to Pet's diversified enterprise, was a producer of all Pet enterprise products, in that

[6] The Board's appellate counsel, intervenor Florida Gulf Coast Building Trades Council, and amicus Building and Construction Trades Department also argue for affirmance of the Board's dismissal of the complaint on first amendment grounds, that is, that the dismissal successfully avoids a first amendment conflict, or, alternatively, that the first amendment protects the handbilling. The Board, however, found it unnecessary to reach or pass upon the first amendment question, and, because the issue has not been addressed by the Board, we decline to do so. We cannot substitute Board counsel's rationale for that of the Board, *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974), because substitution of counsel's rationale or the court's own discretion for that of the Board threatens the integrity of the administrative process and is incompatible with the orderly function of the process of judicial review. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

the income it generated, goodwill it earned, and diversification it provided inured to the benefit of the entire enterprise. *United Steelworkers of America (Pet, Inc.)*, 244 N.L.R.B. No. 6 (1979). The Eighth Circuit majority, however, concluded that the proviso did not cover the union's publicity because Hussmann could not be a producer of the products of Pet and its subsidiaries: Hussmann did not, within the normal meaning of the word "produce," produce Pet's products by benefit of its profits; it had only a highly attenuated connection with Pet's products; and it did not work on any of the Pet products. 641 F.2d at 549. The dissent in *Pet,* however, concluded upon review of the proviso's legislative history and statutory purpose that the Board's broad interpretation of the producer language of the proviso was in harmony with the congressional purpose of protecting all pure publicity by a union. It therefore would have denied Pet's petition for review.

The Board in the case at hand relied in part upon its reasoning in *Pet* in concluding that the handbilling fell within the scope of the publicity proviso.[7] To the extent that the Board's reasoning in that decision supports the conclusions reached in our case, we respectfully differ with the reasoning and conclusions of the Eighth Circuit majority in *Pet* and find more persuasive the reasoning of the dissent.

Our considered judgment is that the Board in the case before us correctly concluded that the proviso applied to the handbilling at the mall and that High is a producer, and DeBartolo and the tenants, distributors, within the meaning of the proviso.

IV. *Location of the Handbilling*

DeBartolo finally argues that, even if the publicity proviso covers the language of the handbill, the activity of handbilling on the mall premises violated the Act. This issue of the location

[7] The Eighth Circuit had not denied enforcement of the Board's order in *Pet* at the time the Board decided this case.

of the handbilling appears to have been raised for the first time on appeal; the Board's decision makes no mention of this argument in its summaries of the parties' contentions, and it does not in any manner address or determine the issue. We therefore decline to consider it, in light of the command of section 10(e) of the Act that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Finding no extraordinary circumstances to excuse DeBartolo, we cannot consider the argument. *See NLRB v. Kotarides Baking Co., Inc.*, 340 F.2d 587 (4th Cir. 1965); *NLRB v. Community Motor Bus Co.*, 335 F.2d 120 (4th Cir. 1964).

V.

Perceiving no merit in DeBartolo's contentions concerning the truthfulness of the handbills or the fulfillment of the publicity proviso's requirements of a producer-distributor relationship, we deny DeBartolo's petition to set aside the Board's order.

PETITION DENIED.

BRITT, District Judge, dissenting:

This matter was presented to the National Labor Relations Board upon stipulated facts, including the following:

> At all times material herein, East Lake Square Mall, located in Tampa, Florida, has been an operating shopping center mall, owned and operated by DeBartolo through its subsidiary, Eastlake Square Associates. At no time germane to this Complaint has DeBartolo operated a retail store at East Lake Square Mall, nor does DeBartolo own any of the property on which the Belk's is located. East Lake Square Mall has approximately 85 tenant employers which, at all times material herein, have leased space in which to operate their respective stores from DeBartolo.... Wilson's is a tenant of DeBartolo while

Belk's is not. DeBartolo has no control over the method or means by which any tenant or Belk's operates its business, except as provided in the applicable lease, property, or maintenance agreement. Neither does any tenant or Belk's have any control over the method or means by which DeBartolo or any other tenant or Belk's does business. Method or means as used herein and hereinafter includes, but is not limited to wages, hours, as well as working conditions and other matters dealing with labor relations. . . .

DeBartolo, through its subsidiary, Eastlake Square Associates, has entered into a land lease with Wilson's, whereby Wilson's will build a department store that will connect to, and become part of the already operating East Lake Square Mall. Pursuant to the terms of the lease, Wilson's is totally responsible for the construction of its store and will own the structure. . . . Wilson's has contracted with High, a general contractor, to build its department store. High has employed its own employees, as well as contracted with various sub-contractors to build Wilson's Department Store. High is not a tenant of DeBartolo, does not engage in the operation of retail stores and does not have a contract to lease or purchase any property in or adjacent to the East Lake Square Mall. . . .

. . . .

Neither DeBartolo, nor any tenant other than Wilson's, nor Belk's, has any contract or business relationship of any type with High. No tenant nor Belk's has any contract or business relationship with Wilson's.

. . . .

The handbilling took place at all four entrances to the Mall which . . . are all located on the private property of DeBartolo but are utilized as means of ingress and egress to the retail stores located in the mall.

. . . .

If it were not for the fact that High was and is performing construction work on the Wilson's store, Respondent would have no dispute with DeBartolo, Belk's or any tenant in the Mall and would have no cause to handbill at East Lake Square Mall.

At all times material herein Belk's has maintained and operated a retail establishment within Hillsborough County, Florida, which is more particularly located at East Lake Square Mall. That retail establishment is located on land which Belk's owns. That land is comprised of approximately 10.72 acres of property within a larger parcel of property otherwise known as East Lake Square Mall. The property owned by Belk's includes the land upon which the store structure stands and the adjacent sidewalks and parking area.

The Wilson's and Belk's retail stores are competitor establishments. Belk's has no business relationship with Wilson's in any manner, and exercises no control over the construction of the Wilson's store to be located at East Lake Square Mall.

Belk's has no contract with nor does it do business in any manner with High.

The only business relationship between Belk's and DeBartolo is that Belk's pays DeBartolo for maintenance and security of common areas. Belk's does not in any way share or split its revenues from its East Lake Square Mall store with DeBartolo. Belk's pays no money or thing of value to any tenant in the Mall and has no business relationship with any of them, except as provided in any provision of the aforesaid lease, property, or maintenance agreements.

Between the dates of January 8, 1980, and January 17, 1980, Respondent Union handbilled at the entrances to Belk's retail store with the identical handbill to that previously distributed at the mall entrances. The handbilling took place at the three entrances to the store itself, all of which took place upon Belk's property. . . .

Neither DeBartolo, Belk's nor any tenant has the ability to remove High as the general contractor on the construction project of the Wilson's store at East Lake Square Mall.

Under these facts the majority concludes that "High is a producer, and DeBartolo and the tenants, distributors" within

the meaning of the publicity proviso of the statute under consideration. 29 U.S.C. § 158(b)(4). Being unable to agree, I respectfully dissent.

A key element of the proviso is that the publicity must relate to a "product" which has been "produced *by an employer with whom the labor organization has a primary dispute.*" *Id.* (emphasis added).

It is undisputed that as to Wilson the handbilling was proper. However, it requires a strained construction of the statute to say that the "mall enterprise itself" is the "product" of High's labor and that the mall owner and tenants distribute that enterprise "simply by conducting business." In my view no case has gone this far. The cases relied on by the majority are factually distinguishable. In one of these, *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46 (1964), Respondent Servette was a wholesale distributor of certain items carried for sale by various retailers. The Union, involved in a dispute with Servette, distributed handbills at the retail stores asking patrons of the stores not to buy certain listed products distributed by Servette. The Supreme Court held that products "produced by an employer" included those distributed by a wholesaler such as Servette.

In *Pet, Inc. v. N. L. R. B.*, 641 F.2d 545 (8th Cir. 1981), the Eighth Circuit reversed a decision of the Board that one of Pet's wholly-owned subsidiaries (Hussmann) was a "producer" of Pet's products. I agree with the majority there, which said: ". . . we think it totally at odds with any normal interpretation of the word 'produce' to say that because Hussmann's profits inure to the benefit of Pet, Hussman produces Pet's products. We find the connection between Pet's products and Hussmann to be highly attenuated." *Id.* at 549.

Whether the handbilling is an unfair labor practice under Section 8(b)(4)(ii)(B) of the Act or whether, as contended by Respondent, it is free speech protected by the first amendment, are matters not addressed by the Board. My vote is to reverse and remand to the Board for consideration of those important and dispositive issues.

Florida Gulf Coast Building Trades Council, AFL-CIO *and* The Edward J. DeBartolo Corporation. Case 12-CC-1062

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon unfair labor practice charges filed on December 17, 1979, by The Edward DeBartolo Corporation (herein also called DeBartolo), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued on February 4, 1980, a complaint against Florida Gulf Coast Building Trades Council, AFL-CIO (herein also called Respondent or the Union), alleging that Respondent engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the complaint and notice of hearing were served on Respondent and the Charging Party. Thereafter, Respondent filed a timely answer denying the commission of any unfair labor practices.

On April 4, 1980, the parties jointly moved the Board to transfer the instant proceeding to the Board without benefit of hearing before an administrative law judge, and submitted therewith a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On May 22, 1980, the Acting Executive Secretary of the Board, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, Respondent, and the Charging Party filed briefs.

Upon the entire record in the case, the Board makes the following findings:

I. JURISDICTION

The complaint alleges, the answer admits, and we find the following:

1. DeBartolo is an Ohio corporation with an office and place of business located in Tampa, Florida, where it is engaged in the leasing of space and management of shopping center malls, including East Lake Square Mall, located in Tampa, Florida. During the past 12 months, a representative period of time, DeBartolo derived in excess of $100,000 gross revenue, of which in excess of $25,000 was derived from employers which in turn meet other than a solely indirect standard for assertion of the Board's jurisdiction.

2. H. J. Wilson Co., Inc. (herein also called Wilson's), is a Louisiana corporation with an office and place of business located in Tampa, Florida, where it is engaged in the business of operating retail department stores. During the past 12 months, a representative period of time, Wilson's has received revenues in excess of $500,000, and in addition has received at its Tampa, Florida, facilities goods valued in excess of $5,000 shipped to it directly from points located outside the State of Florida.

3. H. J. High Construction Company (herein also called High), is a Florida corporation with an office and place of business located in Orlando, Florida, where it is engaged as a general contractor in the building and construction industry at jobsites throughout the State of Florida. During the past 12 months, a representative period of time, High has performed services at its Florida construction sites valued in excess of $50,000 for various employers, including Wilson's, which in turn meet a direct jurisdictional standard of the Board.

4. Each of the above corporations, i.e., DeBartolo, Wilson's, and High, is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5. East Lake Square Mall has approximately 85 tenant employers which, at all times material herein, have leased space in which to operate their respective stores from DeBartolo. Said tenant employers have been, and are now, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.[1]

II. THE LABOR ORGANIZATION INVOLVED

Florida Gulf Coast Building Trades Council, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The issue presented is whether Respondent's handbilling, requesting that consumers cease doing business with all tenants of DeBartolo in its East Lake Square Mall, violated Section 8(b)(4)(ii)(B) of the Act. Based on the following facts, and for the reasons set forth below, we find that Respondent's activity is protected under the second proviso of Section 8(b)(4) of the Act and therefore lawful.

A. Facts

1. DeBartolo's relationship to its tenants at East Lake Square Mall

DeBartolo owns and operates East Lake Square Mall, a shopping center in Tampa, Florida. Approximately 85 tenant-merchants occupy the shopping center under conditions set forth in a standard lease with DeBartolo.

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[1] Although Respondent's answer denies any knowledge as to whether the tenant employers are persons within the meaning of Sec. 8(b)(4), Respondent, the Charging Party, and the General Counsel stipulated, and we so find, that the said tenant employers are persons within the meaning of that section of the Act.

Each tenant agrees to pay DeBartolo a set minimum rent. The standard lease further provides that each tenant's minimum rent will automatically increase 10 percent upon the date each additional department store of certain size or larger opens for business. And, in addition to the minimum rent, each tenant agrees to pay DeBartolo a percentage rent based upon a percentage of the tenant's adjusted gross sales in excess of a set yearly figure.

The standard lease also provides that all tenants shall pay a proportionate share of the cost of operating, maintaining, and repairing the common areas of the shopping center. A new tenant in the shopping center will reduce each tenant's proportionate share.

All tenants must join and pay dues to a merchants association, the purpose of which is, *inter alia*, joint advertising projects. DeBartolo, through the standard lease, exercises control over its tenants' construction work, business hours, employees, signs, and equipment. Each tenant agrees not to use its premises in any way that will injure the reputation of the shopping center or interfere with the operations of the other tenants.

2. The alleged unlawful conduct

Wilson's, a tenant of DeBartolo, has agreed to construct a department store that will connect with and become part of East Lake Square Mall. Wilson's has contracted with High to build its store. Respondent has a primary labor dispute with High involving the payment to its employees of alleged substandard wages and fringe benefits. High is not a tenant of DeBartolo, does not operate department stores, and has no contract or business relationship with DeBartolo or any tenant other than Wilson's.

In furtherance of its dispute with High, Respondent handbilled at all four entrances to East Lake Square Mall. The handbills, which were distributed from December 13, 1979, to

January 4, 1980, when Respondent was enjoined by order of the Thirteenth Judicial Circuit, Hillsborough County, Florida, urge:

> PLEASE *DON'T SHOP AT EAST LAKE SQUARE MALL* PLEASE
>
> The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.
>
> The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's [sic] ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?
>
> CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.
>
> We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.
>
> IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

> We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

The complaint does not allege, nor does any party maintain, that the handbilling was conducted in a disorderly manner, or accompanied by any picketing or patrolling. Neither does the complaint allege, nor does any party insist, that the above-described handbilling had the effect of inducing any individual employed by any person, other than High, to refuse, in the course of his employment, to pick up, deliver, or transport any goods, or to perform any services.

B. *Contentions of the Parties*

The Charging Party contends that Respondent violated Section 8(b)(4)(ii)(B) of the Act when, in furtherance of its primary dispute with High, it distributed handbills calling for a total consumer boycott of DeBartolo and the tenant employers leasing space at East Lake Square Mall. The Charging Party admits that, as a result of High's construction of a department store for Wilson's, the Union may urge a total consumer boycott of Wilson's as well as High. However, it contends, DeBartolo and the tenant employers other than Wilson's have no relationship to High and, as neutral persons, are protected by Section 8(b)(4)(ii)(B) from any secondary activity by the Union. Nor, argues the Charging Party, is Respondent's handbilling rescued by the publicity proviso of Section 8(b)(4), because there is no "producer-distributor" relationship between High and DeBartolo or between High and the tenant employers other than Wilson's. It argues that the publicity proviso, which allows a union to request consumers of secondary employers who in some way have relationship to the primary employer in a labor dispute to bring pressure on the secondary to cease doing business with the primary, does not encompass activity against secondary employers who have no relationship with the primary.

The General Counsel contends that Respondent's handbilling violated the Act in that it threatened or restrained the tenant employers (other than Wilson's) who lease space from DeBartolo, by requesting the public to cease doing business with them, in order to force DeBartolo and/or Wilson's not to do business with High. The General Counsel concedes that Respondent's handbilling, as far as it seeks a total consumer boycott of Wilson's, does not violate the Act because Wilson's is in a "producer-distributor" relationship with High, as defined in *United Steelworkers of America, AFL-CIO-CLC (Pet, Incorporated)*, 244 NLRB No. 6 (1979). The General Counsel further argues that Respondent may handbill the public not to do business with the Charging Party because, as the owner of the property the value of which will be enhanced by the addition of the Wilson's store being constructed by High, DeBartolo is a "distributor" of High's product, citing *Scott Hudgens*, 230 NLRB 414, 417-418 (1977).

Respondent argues, *inter alia*, that its handbilling of DeBartolo and tenants of the shopping center is protected by the publicity proviso of Section 8(b)(4). The Union, citing *Pet, supra*, asserts that the mall tenants are connected with the "product" produced by High for Wilson's because the tenants (including Wilson's) derive substantial benefit from each other's presence and that this benefit is enhanced by the existence of the Wilson's store. DeBartolo, in turn, is related to its tenants because it is dependent upon their commercial success, which it attempts to secure by exercising certain controls over its tenants through leases. Moreover, the Union contends that distribution of handbills directed at DeBartolo as owner of the mall is consistent with the proviso, and that including the tenants has no additional effect because the mall and the tenants are perceived as one and the same by the public.

Finally, Respondent urges that the Board construe the proviso to protect the instant handbilling in order to avoid generation of a substantial first amendment issue.

C. Discussion of Law and Conclusions

Section 8(b)(4)(ii)(B), which makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person where an object thereof is to force or require any person to cease doing business with any other person, exempts from its proscription:

> . . . publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pickup, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. . . .

For the reasons set forth in *Pet* and below, we find that Respondent's handbilling comes within the ambit of the publicity proviso.[2]

---

[2] The proviso is inapplicable if a consumer boycott results in refusals by employees, other than those of the primary employer, to pick up, deliver, or transport goods or to perform services, or the publicity is untruthful. As noted above, no party claims that Respondent's handbilling had the effect of inducing any individual employed by any person, other than High, to refuse, in the course of employment, to pickup, deliver, or transport any goods, or not to perform any services, and the record does not indicate otherwise.

Respecting the truthfulness requirement, the Charging Party in its brief contends that Respondent's handbills are misleading and untruthful in that (a) the request that the public not shop at any store in the mall includes employers who are totally neutral to the primary dispute, (b) the handbill does not identify with whom the Union has a primary dispute, and (c) Respondent does not have a dispute with any producer of products of DeBartolo or the tenant employers other than Wilson's. We believe that contentions (a) and (c), as in *Pet*,

Footnote continued on next page.

In *Pet*, relying upon *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46 (1964), we held that a union could lawfully handbill a neutral employer, urging a total consumer boycott of that employer, "so long as the primary employer has at some stage produced, in the sense of applying capital, enterprise, or service, a stage product of the neutral employer." We found that Hussmann (the primary employer), Pet Corporation, and its various subdivisions were related in that each operation provided support for and contributed to the others. Hussmann "produced" the product of Pet in that the income generated by Hussmann inured to the benefit of the entire enterprise, and the goodwill it earned enhanced the reputation of all Pet operations.

Similarly, a mutually dependent and beneficial relationship exists between High on the one hand, and DeBartolo and the tenants of the mall, including Wilson's. Significantly, DeBartolo perceives itself and its tenants as engaged in an enterprise that imposes mutual obligations in order to achieve financial success. The lease memorializes these obligations and evidences the collective dependence of the mall owner and its tenants. Each tenant agrees to operate its premises in a way

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Footnote continued from previous page.

actually address the legal question of whether High has "produced" a product of DeBartolo and its tenants other than Wilson's. Further, the Charging Party has not established that the handbill on its face, by omitting the name of High, substantially departed from fact or intended to decieve. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537 (Jack M. Lohman, d/b/a Lohman Sales Company)*, 132 NLRB 901, 906 (1961). Thus, the handbill accurately states that the Union believes Wilson's department store is being built by a contractor which pays substandard wages and benefits, and requests that consumers not patronize the owner of the mall and its tenants until assurance is given that new stores will be constructed by contractors which pay fair wages and benefits. In view of the above, we find merit to the Charging Party's contentions regarding the truthfulness of the handbills.

that will not injure the reputation of the shopping center or interfere with the operations of the other tenants. All tenants pay a proportionate share of the costs of operating, maintaining, and repairing the common areas of the mall, and each tenant's share is reduced each time a new tenant opens business. Each tenant's lease, in recognition of the fact that new stores will enhance the value of existing stores, provides that the minimum rent will increase 10 percent when new stores open at the mall. Finally, each tenant is obligated to join the shopping center's merchants association and to participate in its joint advertising projects.

Obviously, the tenants would not submit to these provisions unless they were assured of commensurate advantages as mall tenants. The advantages derive from the fact that the success of each tenant contributes to, and depends upon, the success of the others. The addition of a Wilson's department store to the mall exemplifies this interdependency. A functioning Wilson's store will attract consumers to the mall who will then visit and purchase products from other tenants, and, reciprocally, Wilson's will profit from its proximity to the other tenants. Thus, each tenant gains the advantage of a market attracted by all the other tenants. Further, DeBartolo is not wholly unconcerned with this relationship, for its leases provide that, in addition to receiving monthly rents, it will share in the commercial success through percentage rents it collects from the tenants. To increase the prospects of success, DeBartolo exercises control over tenants' construction work, business hours, employees, signs, and equipment.

In sum, we find that the mutual obligations between the parties and the benefits derived from participation in the mall enterprise reflect the symbiotic nature of the relationship between DeBartolo and its tenants, not unlike the relationship between the operations of a diversified corporation. High's contribution to this enterprise is as an employer which applies its labor to a product, i.e., the Wilson's store, from which

DeBartolo and its tenants will derive substantial benefit. Consequently, we find as a result of its relationship with Wilson's and the shopping center enterprise that High applies capital, enterprise, and service to that enterprise, and thus that it is a "producer" in the sense that that term is used in the publicity proviso as interpreted by the Supreme Court in *Servette, supra,* and by this Board in *Pet, supra.*

Having found High to be a producer within the meaning of Section 8(b)(4), we find that Respondent's handbilling urging a total consumer boycott of DeBartolo and its tenants other than Wilson's is protected by the publicity proviso of that section of the Act.

Accordingly, we shall dismiss the complaint in its entirety.[3]

ORDER

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER PENELLO, dissenting:

I would revoke our acceptance of the parties' stipulated record and remand the proceeding for a hearing on factual issues not addressed by the stipulation. On May 22, 1980, we accepted the stipulation because we had no reason to doubt that only issues of law remained to be decided. Subsequently, the parties submitted briefs. Now it appears from the briefs that significant questions of fact remain, on which the stipulation is silent, concerning the truthfulness of the handbills distributed by Respondent, the resolution of which are an essential element in determining whether Respondent's activity is or is not protected by the publicity proviso of Section 8(b)(4).

[3] As in *Pet, supra,* at fn. 33, because we find Respondent's handbilling within the ambit of the publicity proviso of the Act, we find it unnecessary to reach or pass upon whether Respondent's conduct is protected by the first amendment.

Accordingly, because there are relevant and unresolved factual issues, I do not believe that we can conclude on the basis of this stipulated record whether our statute has been violated. At this time I address only this threshold issue, and need not decide whether, if Respondent's publicity were truthful, the handbilling herein would be protected by the second proviso of Section 8(b)(4).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

October 20, 1981

TO: Mark E. Levitt, Esq.
W. Reynolds Allen, Esq.
Elliott Moore, Esq.
Laurence J. Cohen, Esq.
Mark F. Kelly, Esq.
Terry L. Karnze, Esq.
Lynn E. Gilfillan, Esq.

80-1745

NOTICE OF JUDGMENT

Judgment was entered in Case No._____ this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

WILLIAM K. SLATE, II
CLERK

Enclosure

Filed January 26, 1982
U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1745

The Edward J. DeBartolo Corp.,
Petitioner,

versus

The National Labor Relations Board,
Respondent.
Florida Gulf Coast Building Trades Council,
/R *Intervenor*
The American Retail Federation
/P *Amicus Curiae.*
The Chamber of Commerce of USA
/P *Amicus Curiae.*
Building and Construction Trades Dept., AFL-CIO,
/R *Amicus Curiae.*

ORDER

The petitioner's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Ervin with the concurrence of Judge Butzner and Judge Britt, U.S.D.J. Judge Russell, Judge Widener, Judge Murnaghan, and Judge Chapman would have granted rehearing en banc.

For the Court

/s/ William K. Slate, II
Clerk

Supplemental Brief

No. 81-1985

Office - Supreme Court, U.S.
FILED
JUL 16 1982
L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Respondents.

SUPPLEMENTAL MEMORANDUM TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Respondents.

SUPPLEMENTAL MEMORANDUM TO PETITION FOR WRIT OF CERTIORARI

This memorandum is filed in response to the Court's letter of June 28, 1982 requesting the parties to comment upon the question of mootness.

No party in this case has previously contended, and Petitioner does not now contend, that this case is moot.[1] To the

[1] See, e.g., the Brief of Respondent National Labor Relations Board to the Court of Appeals (at 34, n. 19) which correctly reflects the position of the parties before that Court:

> No one has suggested, however, that this case is moot. It is well established that, in cases of labor-management conflict, cessation of the challenged conduct cannot assure that the underlying controversy will not be reopened or that the challenged conduct will not recur [citations omitted].

contrary, both the court below as well as the Eighth Circuit in the same circumstances in *Pet, Inc.* v. *N. L. R. B.*, 641 F. 2d 545, 545 n. 1 (8th Cir. 1981), correctly determined that this matter remains live notwithstanding that the particular construction which gave rise to this controversy has been discontinued.

A. Although a labor dispute may have ceased, unless "there is no reasonable expectation that the wrong will be repeated," the "public interest in having the legality of the practices settled . . . militates against a mootness conclusion." *N. L. R. B.* v. *Raytheon Co.*, 398 U. S. 25, 27 (1970); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). The reason for this rule is apparent, particularly where, as here, the legitimacy of a strike, boycott or handbilling is at issue. This type of controversy is frequently concluded prior to even the initial Board, let alone appellate, adjudication.[2] If the termination of such a dispute rendered it moot, few, if any, aggrieved parties would ever have redress. Labor disputes, moreover, are more likely than other actions "to be repeated" and prevent "a decision as to . . . legality . . . [from becoming] a futile exercise of jurisdiction." *N. L. R. B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (7th Cir. 1963). Both this Court and others, as a

[2] The most recent final figures available indicate that the median duration of strikes in 1980, a record year for the longevity of work stoppages, was 18 days. U. S. Department of Labor, Bureau of Labor Statistics, *Analysis of Work Stoppages, 1980,* Bulletin 2120, at 1 (March 1982). By contrast, in the same year, the median days from the filing of an NLRB charge to the issuance of a *complaint* was 46 days and the average age of cases pending Board decision as of September 30, 1980 was 547 days. 45 NLRB Ann. Rep. at 294 (1980). *See also Super Tire Engineering Corp.* v. *McCorkle,* 416 U. S. 115, 126 (1974) ("[T]he great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender.")

result, have frequently adjudicated labor controversies even after the settlement of the underlying dispute.[3]

In addition to recognizing the need to protect the public interest in a Labor Act case, this Court has also observed that the requirement "of an active and live labor dispute would tax the litigant too much by arbitrarily slighting claims of adverse injury from concrete governmental action . . . The important ingredient . . . [is] governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire Engineering Corp.* v. *McCorkle,* 416 U. S. at 125-6. The "extant and fixed" policy of the Board (*id.* at 124) here at issue, as demonstrated by its decision in both this case and *Pet,* is that a secondary boycott of the type involved in this case does not constitute an unfair labor practice.[4] This policy has not

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[3] *See, e.g., Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U. S. 397 (1976); *Super Tire Engineering Corp.* v. *McCorkle, supra; N.L.R.B.* v. *Raytheon Co., supra, N.L.R.B.* v. *Local 825, Operating Engineers,* 400 U. S. 297 (1971); *N.L.R.B.* v. *Mexia Textile Mills,* 339 U. S. 563 (1950); and *Local 1976, Carpenters* v. *N.L.R.B.,* 357 U. S. 93 (1958). *See also N.L.R.B.* v. *Marsh Supermarkets, Inc., supra, N.L.R.B.* v. *United Hatters,* 286 F. 2d 950 (4th Cir. 1961); *N.L.R.B.* v. *Plumbers Union of Nassau County, Local 457,* 299 F. 2d 497 (2nd Cir. 1962); *N.L.R.B.* v. *Globe Wernicke Systems Co.,* 336 F. 2d 589 (6th Cir. 1964); *Pacific Maritime Ass'n* v. *Int'l Longshoremen's Union,* 454 F. 2d 262 (9th Cir. 1971); *Atlantic Richfield Co.* v. *Oil, Chemical & Atomic Workers Int'l Union,* 447 F. 2d 945 (7th Cir. 1971); *General Dynamics Corp.* v. *Local 5, Shipbuilders,* 469 F. 2d 848 (1st Cir. 1972); and *Avco Corp.* v. *Local 787, UAW,* 459 F. 2d 968 (3rd Cir. 1972).

[4] Because of this present posture of the Board, it is likely, as *amicus* Chamber of Commerce has noted (Br., p. 9), that the Board's General Counsel may hereafter simply decline to issue complaints in this area. In effect, therefore, a finding of mootness in this case would preclude this Court from ever resolving the significant questions presented. It is of "vital importance," however, that the brief duration of wrongful conduct not be used to so foreclose permanently the

(Footnote continued on next page.)

"evaporated or disappeared." *Id.* at 122. It is certain to be applied in future cases involving not only the Petitioner but numerous other parties as well. Future application of the challenged governmental policy is neither speculative, contingent or remote. *See Fla. Bd. of Business Regulation* v. *N. L. R. B.*, 605 F. 2d 916 (5th Cir. 1979). The legitimacy of that policy warrants review.

B. The instant case presents a "classic justification for a conclusion of non-mootness. It truly could be capable of repetition, yet evading review." *Roe* v. *Wade*, 410 U. S. 113, 125 (1973), quoting *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498 (1911). A question is "capable of repetition, yet evading review" where "(1) the challenged action in its duration was too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975), citing *Sosna* v. *Iowa*, 419 U. S. 393 (1975). Both of these requirements have been met here.

As previously noted, the brevity of a labor dispute such as that involved in this case would virtually always prohibit judicial review prior to its cessation.[5] The necessarily brief

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(Footnote continued from preceding page.)

"avenues of judicial review" to an entire affected class. *Sibron* v. *New York*, 392 U. S. 40, 51-53 (1968); *see also Solien* v. *Misc. Drivers and Helpers Union, Local 610*, 440 F. 2d 124, 127-8 (8th Cir. 1971) ("[W]e believe that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justicable cases. . . .")

[5] In a case where a remedial order remains in effect, although there has been a cessation of the illegal activity involved, the need for the protection afforded by that order to avoid a repetition of the wrong precludes a finding of mootness. *N.L.R.B.* v. *Raytheon Co.*, 398 U. S. at 28. In such situations, therefore, a resolution on the

(Footnote continued on next page.)

duration of the construction of the Wilson's store in the instant case is thus no different than the similarly brief duration of a pregnancy or an election; in none of these cases should the judiciary prevent a challenge to governmental policies "that have had their impact and that continue in force, unabated and unreviewed." *Super Tire Engineering Corp.* v. *McCorkle,* 416 U. S. at 126.

There is also a "reasonable expectation" that either Petitioner, who is the owner and operator of thirty-five shopping centers throughout the United States, or any of its numerous tenants will again be subjected to the same type of secondary boycott as occurred in this case. As shown in the Petition and the *amicus* brief in support thereof, the secondary boycott has become a powerful union weapon whose use the decision below has sanctioned in a multitude of potential situations.[6] There is,

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(Footnote continued from preceding page.)

merits is necessary to assure that the acts complained of will not be repeated. The analytical posture of the present case is no different. The Board should have found that the Union's conduct in this case violated Section 8(b)(4) of the Labor Act and the Court of Appeals should have enforced that order. Their erroneous failure to do so—the subject matter of the instant Petition—should not prevent an adjudication on the merits of those determinations particularly where, by finding this controversy moot, future review of that question will be rendered virtually impossible. See footnote 4, *supra.*

[6] A resumption of the particular construction project that occasioned the present litigation is not necessary for the Petitioner to become embroiled in a similar secondary boycott. If *any* tenant at *any* of Petitioner's shopping centers has *any* supplier or customer with whom a union has *any* dispute, that controversy, under the decision in this case, could now be extended to improperly encompass Petitioner and the other tenants at that center. This type of situation could include, for example, a non-union supplier of merchandise to a tenant, a customer of a tenant who allegedly does not pay union standard wages and benefits, a tenant who has an officer or director who also serves in that capacity for another employer with whom the union has

(Footnote continued on next page.)

therefore, a "reasonable expectation," within the meaning of *Weinstein*, that Petitioner will again suffer the same type of injury either at the East Lake Square Mall or at one of its other shopping centers. *See, e.g., S.E.C.* v. *Sloan*, 436 U. S. 103, 110 (1978).

For all of the foregoing reasons, the Petitioner submits that this case is not moot and that the Court should grant the Petition.

Respectfully submitted,

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(Footnote continued from preceding page.)

a disagreement or even a tenant who is utilizing non-union construction employees at another location. The multitude and variety of these potential disputes demonstrates that the likelihood of Petitioner again being subjected to the same alleged wrong as occurred in this case is a reasonable expectation, not merely conjecture or speculation.

Joint Appendix

No. 81-1985

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IN THE

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FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: The Edward J. DeBartolo Corp.
Case No.: 81-1985

12.17.79	Charge, filed
2. 4.80	Complaint and Notice of Hearing, dated
2. 4.80	Union's Answer, dated
2. 7.80	Regional Director's Order Setting date, time and place of Hearing, dated
3.20.80	Regional Director's Order Rescheduling Hearing, dated
4. 2.80	Stipulation of Facts entered into by the Parties, dated
5.22.80	Board's Order Approving Stipulation and Transferring Proceeding to the Board, dated
7. 3.80	Union's Brief to the Board, received
7. 3.80	Petitioner's Brief to the Board, received
7. 3.80	Brief to the Board on Behalf of the General Counsel, received
9.30.80	Decision and Order issued by the National Labor Relations Board
10. 7.80	Board's Order Correcting Decision and Order, dated
3. 9.81	Petitioner's Brief to the Fourth Circuit Court of Appeals, on Petition for Review of an Order of the Board, dated
4.17.81	Brief of the National Labor Relations Board to the Fourth Circuit Court of Appeals, filed
5. 2.81	Intervenor's Brief to the Fourth Circuit Court of Appeals, dated

5.14.81	Petitioner's Reply Brief to the Fourth Circuit Court of Appeals, dated
10.20.81	Decision of the Fourth Circuit Court of Appeals, dated
1.26.82	Order of the Fourth Circuit Court of Appeals denying rehearing en banc, filed
4.23.82	Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, filed
5.26.82	Memorandum for the National Labor Relations Board, filed
5.28.82	Memorandum for the Union, filed
6.28.82	United States Supreme Court Order requesting Supplemental Memoranda regarding the question of mootness, dated
7.15.82	Supplemental Memorandum for the National Labor Relations Board, filed
7.15.82	Supplemental Memorandum for the Union, filed
7.16.82	Supplemental Memorandum to Petition for Writ of Certiorari, filed
10.12.82	Petition for a Writ of Certiorari granted

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space
Case No. 12-CC-1062
Date Filed 12/17/79

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name Florida Gulf Coast Building Trades Council, AFL-CIO

b. Union Representative to Contact J. G. Cain

c. Phone No. 621-6451 224-0174

d. Address (Street, city, State and ZIP code) 3505 Central Avenue Tampa, Florida 33603

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(i)(ii)(B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.) Since on or about December 13, 1979, and continuing to date, the above-named labor organization has engaged in, or induced or en-

couraged any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; and it has threatened, coerced, or restrained, persons engaged in commerce or in an industry affecting commerce, where in either case, an object was to force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processer, or manufacturer, or to cease doing business with any other person.

3. Name of Employer The Edward J. DeBartolo Corp.

4. Phone No. 621-7575

5. Location of Plant Involved (Street, city, State and ZIP code) 5701 East Hillsborough Avenue, Tampa, Florida 33610

6. Employer Representative to Contact Harold E. Skipper

7. Type of Establishment (Factory, mine, wholesaler, etc.) Shopping Mall

8. Identify Principal Product or Service Shopping Mall

9. No. of Workers Employed 25

10. Full Name of Party Filing Charge The Edward J. DeBartolo Corp.

11. Address of Party Filing Charge (Street, city, State and ZIP code) 5701 East Hillsborough Avenue, Tampa, Florida 33610

12. Telephone No. 621-7575

13. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Mark E. Levitt
(Signature of representative or person making charge)
Mark E. Levitt
Hogg, Allen, Ryce, Norton & Blue
First Florida Tower
Suite 2712
Tampa, Florida 33602
Address
Attorney
(Title or office, if any)
229-1341
(Telephone number)
12/17/79
(Date)

Willfully False Statements on This Charge Can Be Punished by Fine and Imprisonment (U.S. Code, Title 18, Section 1601)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 12

Case 12-CC-1062

FLORIDA GULF COAST BUILDING TRADES
COUNCIL, AFL-CIO

and

THE EDWARD J. DEBARTOLO CORP.

COMPLAINT AND NOTICE OF HEARING

(Dated February 4, 1980)

It having been charged by The Edward J. DeBartolo Corp. (herein called DeBartolo), that Florida Gulf Coast Building Trades Council (herein called Respondent) has been engaging in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director for Region 12, pursuant to Section 10(b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

The charge was filed by DeBartolo on December 17, 1979, and a copy thereof was duly served upon Respondent by registered mail on or about the same date.

(a) DeBartolo is an Ohio corporation with an office and place of business located in Tampa, Florida, where it is engaged in the leasing of space and management of shopping center malls, including East Lake Square Mall, located in Tampa, Florida.

(b) During the past 12 months, a representative period of time, DeBartolo derived in excess of $100,000 gross revenue, of which in excess of $25,000 was derived from Employers, which in turn meet other than a solely indirect standard for assertion of the Board's jurisdiction.

(c) DeBartolo is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3.

(a) H. J. High Construction Company (herein High) is a Florida corporation with an office and place of business located in Orlando, Florida, where it is engaged as a general contractor in the building and construction industry at jobsites throughout the State of Florida.

(b) During the past 12 months, a representative period of time, High has performed services at its Florida construction sites, valued in excess of $50,000 for various Employers, including Wilson's, which in turn meet a direct jurisdictional standard of the Board.

(c) High is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4.

(a) H. J. Wilson Co., Inc. (herein Wilson's) is a Louisiana corporation with an office and place of business

located in Tampa, Florida, where it is engaged in the business of operating retail department stores.

(b) During the past 12 months, a representative period of time, Wilson's has received revenues in excess of $500,000, and in addition has received at its Tampa, Florida facilities, goods valued in excess of $5,000 shipped to it directly from points located outside the State of Florida.

(c) Wilson's is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

At all times material herein, the tenant Employers of East Lake Square Mall, and each of them, have been and are now, persons engaged in commerce or in an industry affecting commerce, within the meaning of Section 8(b)(4) of the Act.

7.

(a) At all times material herein, and specifically since on or about December 13, 1979, Respondent has had a primary labor dispute with High involving the payment to its employees of alleged substandard wages and fringe benefits, in its construction of a retail store for Wilson's in East Lake Square Mall.

(b) At no time material herein has Respondent had any primary labor dispute with DeBartolo, Wilson's or the tenant Employers of East Lake Square Mall.

8.

(a) Between the approximate dates of December 13, 1979 and January 4, 1980, Respondent, in furtherance of its primary labor dispute with High as described in paragraph 7, subparagraph (a) above, has threatened, coerced or restrained, and is threatening, coercing or restraining, various tenant Employers who are engaged in business at East Lake Square Mall, and who lease space from DeBartolo in East Lake Square Mall, by handbilling the general public not to do business with the above-described tenant Employers because High *allegedly* pays substandard wages and fringe benefits to its employees constructing a retail store for Wilson's in East Lake Square Mall.

(b) An object of the acts and conduct of Respondent set forth in paragraph 8, subparagraph (a) above, was and is, to force or require the aforesaid tenant Employers in East Lake Square Mall, and other persons engaged in commerce or an industry affecting commerce, to cease using, handling, transporting, or otherwise dealing in products and/or services of, and to cease doing business with DeBartolo, in order to force DeBartolo and/or Wilson's not to do business with High.

9.

By the acts and conduct set forth in subparagraph 8(a) above, and by each of said acts, and for the object set forth in subparagraph 8(b) above, Respondent did engage in unfair labor practices in violation of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

10.

The acts of Respondent described in paragraph 8 above, occurring in connection with the operations of the Em-

ployers described in paragraphs 2, 3 and 4 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on a date and time and place to be later designated, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings is attached.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Regional Director, an original and four copies of an answer to said complaint within 10 days from the service thereof, and that unless it does so, all of the allegations of the complaint shall be deemed to be admitted to be true and may be so found by the Board. Respondent shall immediately serve a copy of the answer, as required by the above sections of the Rules on each of the other parties.

DATED AT Tampa, Florida, this 4th day of February 1980.

/s/ Harold A. Boire
Harold A. Boire
Regional Director
National Labor Relations Board
Region 12
706 Federal Building
500 Zack Street
P. O. Box 3322
Tampa, Florida 33601

(SEAL)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

The hearing will be conducted by an Administrative Law Judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial trier of the facts and the law whose decision in due time will be served on the parties. The offices of the Administrative Law Judges are located in Washington, D. C., and San Francisco, California.

At the date, hour, and place for which the hearing is set, the Administrative Law Judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clearcut; or the Administrative Law Judge may independently conduct such a conference. The Administrative Law Judge will preside at such conference, but may, if the occasion arises, permit

the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Administrative Law Judge conducting the prehearing conference will be the one who will conduct the hearing; and *it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference.* No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(*This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.*)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Administrative Law Judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Administrative Law Judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Administrative Law Judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Administrative Law Judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the Administrative Law Judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the Administrative Law Judge before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Administrative Law Judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Administrative Law Judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Administrative Law Judge who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, Series 8, as amended, with respect to the

procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Administrative Law Judge will be considered unless received by the Chief Administrative Law Judge in Washington, D.C., (*or, in cases under the San Francisco, California, branch office of Administrative Law Judges, the Deputy Chief Administrative Law Judge in charge of such office*) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or Deputy Chief Administrative Law Judge, as the case may be. All briefs or proposed findings filed with the Administrative Law Judge must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service on the other parties.

In due course the Administrative Law Judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the Administrative Law Judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Administrative Law Judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and fol-

lowing sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the Administrative Law Judge may suggest discussions between the parties or, upon request, will afford reasonable opportunity during the hearing for such discussions.

NATIONAL LABOR RELATIONS BOARD
NOTICE

Case No. 12-CC-1062

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

(1) The request must be in writing. An original and two copies must be served on the Regional Director;

(2) Grounds therefor must be set forth *in detail;*

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Florida Gulf Coast Building
Trades Council, AFL-CIO
3505 Central Avenue
Tampa, FL 33603

Mark F. Kelly, Esquire
341 Plant Avenue
Tampa, Florida 33606

The Edward J. DeBartolo Corp.
5701 East Hillsborough Ave.
Tampa, Florida 33610

Mark E. Levitt, Esquire
Hogg, Allen, Ryce, Norton & Blue
First Florida Tower, Suite 2712
Tampa, Florida 33602

cc: Marc Jelovchan
Atlanta Reporting Service
P. O. Box 33
Neptune Beach, FL 32233

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 12

Case No. 12-CC-1062

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,
Respondent,

and

THE EDWARD J. DeBARTOLO CORP.,
Employer.

ANSWER

(Dated February 4, 1980)

The Florida Gulf Coast Building Trades Council, AFL-CIO, the Respondent in the above-styled matter, answers the complaint pursuant to §102.20 of the Board's Rules and Regulations:

I.

The Respondent admits the allegations contained within the paragraphs of the complaint numbered 1, 2(a), 2(b), 2(c), 3(a), 3(b), 3(c), 4(a), 4(b), 4(c), 5, and 7(a).

II.

The Respondent is without knowledge as to the allegations contained within the paragraph of the complaint numbered 6, with the exception that the Respondent admits that various premises located at Eastlake Square Mall are occupied by tenants but the Respondent is without knowledge as to whether such tenants are employers within

the meaning of §2(2) of the Act and it is without knowledge as to whether such tenants are persons engaged in commerce or in an industry affecting commerce within the meaning of §§ 2(6) and 2(7) of the Act.

III.

The Respondent denies the allegations contained within the paragraphs of the complaint numbered 7(b), 8(a), 8(b), 9, 10, and 11.

/s/ Richard H. Frank
Richard H. Frank,
Law Offices of Frank, Chamblee & Kelly, P.A.
341 Plant Avenue
Tampa, Florida 33606
(813) 251-0555
Attorneys for Respondent

(Certificate of Service Omitted in Printing)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 12

Case 12-CC-1062

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO

and

THE EDWARD J. DEBARTOLO CORPORATION

STIPULATION OF FACTS

(Dated April 2, 1980)

Comes now Florida Gulf Coast Building Trades Council, AFL-CIO, Respondent; The Edward J. DeBartolo Corporation, the Charging Party; and Counsel for the General Counsel, being all the parties to this proceeding, and hereby petition the Board, in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, to exercise its powers under Section 102.50 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, to transfer to and continue this proceeding before the Board and to accept this Stipulation of Facts.

1.

The parties agree that the charge, complaint, answer, the instant "Stipulation of Facts", and Exhibits attached thereto, constitute the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing before an Administrative Law Judge, the making of findings of facts and conclusions of law by an

Administrative Law Judge and the issuance of an Administrative Law Judge's Decision, and desire to submit this case for findings of facts, conclusions of law, and a Decision and Order directly by the Board. The parties do not waive any rights to which they may be entitled after the issuance of Decision and Order of the Board.

2.

In the event the Board accepts this Stipulation of Facts and transfers this proceeding to the Board, the parties request that the Board set a reasonable period of time for filing of briefs and/or proposed findings of fact and conclusions of law.

3.

The instant charge was filed on December 17, 1979, by the Edward J. DeBartolo Corporation (herein DeBartolo), and a copy thereof was duly served upon Respondent Florida Gulf Coast Building Trades Council (herein the Union) on or about the same date.

4.

DeBartolo is an Ohio corporation with an office and place of business located in Tampa, Florida, where it is engaged in the leasing of space and management of shopping center malls, including East Lake Square Mall, located in Tampa, Florida. DeBartolo has nothing to do with the operation or management of any of the retail stores in the Mall, including Wilson's and Belk's, apart from those matters set forth in the applicable lease, property management or maintenance agreements. During the past twelve months, a representative period of time, DeBartolo derived in excess of $100,000 gross revenue, of which in excess of $25,000 was derived from Employ-

ers, which in turn meet other than a solely indirect standard for assertion of the Board's jurisdiction. DeBartolo is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

H. J. Wilson Co., Inc. (herein Wilson's) is a Louisiana corporation with an office and place of business located in Tampa, Florida, where it is engaged in the business of operating retail department stores. During the past twelve months, a representative period of time, Wilson's has received in excess of $500,000 in revenues, and in addition has received at its Tampa, Florida, facilities goods valued in excess of $5,000 shipped to it directly from points located outside the State of Florida. Wilson's is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6.

Belk Lindsey of Tampa, Inc. (herein Belk's) is a Florida corporation with an office and a place of business located in Tampa, Florida, where it is engaged in the business of operating retail department stores. During the past twelve months, a representative period of time, Belk's has received in excess of $500,000 in revenues, and in addition has received at its Tampa, Florida facilities, goods valued in excess of $50,000 shipped to it directly from points located outside the State of Florida. Belk's is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

7.

H. J. High Construction Company (herein High) is a Florida corporation with an office and place of business located in Orlando, Florida, where it is engaged as a general contractor in the building and construction industry at jobsites throughout the State of Florida. During the past twelve months, a representative period of time, High has performed services at its Florida jobsites, valued in excess of $50,000 for various employers, including Wilson's, which in turn meet a direct jurisdictional standard of the Board. High is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

8.

Respondent Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

9.

At all times material herein, East Lake Square Mall, located in Tampa, Florida, has been an operating shopping center mall, owned and operated by DeBartolo through its subsidiary, Eastlake Square Associates. At no time germane to this Complaint has DeBartolo operated a retail store at East Lake Square Mall, nor does DeBartolo own any of the property on which the Belk's is located. East Lake Square Mall has approximately 85 tenant employers which, at all times material herein, have leased space in which to operate their respective stores from DeBartolo. At all times material herein, said tenant employers have been, and are now, persons engaged in commerce or in an industry affecting commerce, within the meaning of Section 8(b)(4) of the Act. Wilson's is a tenant of

DeBartolo while Belk's is not. DeBartolo has no control over the method or means by which any tenant or Belk's operates its business, except as provided in the applicable lease, property, or maintenance agreement. Neither does any tenant or Belk's have any control over the method or means by which DeBartolo or any other tenant or Belk's does business. Method or means as used herein and hereinafter includes, but is not limited to wages, hours, as well as working conditions and other matters dealing with labor relations. Copy of a sample standard lease agreement is attached as Joint Exhibit 1.

10.

DeBartolo, through its subsidiary, Eastlake Square Associates, has entered into a land lease with Wilson's, whereby Wilson's will build a department store that will connect to, and become part of the already operating East Lake Square Mall. Pursuant to the terms of the lease, Wilson's is totally responsible for the construction of its store and will own the structure. The responsibilities and duties of Wilson's and DeBartolo are more fully set forth in the lease, which is attached hereto as Joint Exhibit 2. Wilson's has contracted with High, a general contractor, to build its department store. High has employed its own employees, as well as contracted with various sub-contractors to build Wilson's Department Store. High is not a tenant of DeBartolo, does not engage in the operation of retail stores and does not have a contract to lease or purchase any property in or adjacent to the East Lake Square Mall. Apart from any provisions contained in Joint Exhibit 2, neither DeBartolo, nor any tenant, nor Belk's had or has anything to do with the selection of High by Wilson's or of Sub-contractors by High, nor do they or any of them in any way control, dictate or suggest the wages, hours or working conditions paid by High

to its employees or by any sub-contractor to its employees. Apart from any rights arising from Joint Exhibit 1, no tenant, nor Belk's has any control over the construction of the Wilson's store, including the method or means by which it is constructed.

11.

At no time germane to this Complaint has Wilson's operated a retail store at East Lake Square Mall.

12.

Neither DeBartolo, nor any tenant other than Wilson's, nor Belk's, has any contract or business relationship of any type with High. No tenant nor Belk's has any contract or business relationship with Wilson's.

13.

At all times material herein, Respondent Union has had a primary labor dispute with High involving the payment to its employees of alleged substandard wages and fringe benefits.

14.

Between the dates of December 13, 1979, and January 4, 1980, Respondent Union handbilled at the entrances to East Lake Square Mall [copy of handbill attached as Joint Exhibit 3]. The handbilling ceased only because of an Order of the Circuit Court of the 13th Judicial Circuit, Hillsborough County, Florida, enjoining such activity [copy of Order attached as Joint Exhibit 4].

15.

Joint Exhibit 5 is a plot plan of East Lake Square Mall. The handbilling took place at all four entrances to the

Mall which are identified by the letter "X" on Joint Exhibit 5. The four entrances are all located on the private property of DeBartolo but are utilized as means of ingress and egress to the retail stores located in the Mall.

16.

On December 20, 1979, Charging Party, by and through its attorney, sent a letter to Mark F. Kelly, attorney for Respondent, relating to Respondent's handbilling activity. [A copy of said letter is attached hereto as Joint Exhibit 6.] Respondent received this letter in due course. Thereafter, Respondent refused to agree to alter its activity in accordance therewith and continued to handbill in the same fashion as it had done since December 13, 1979.

17.

If it were not for the fact that High was and is performing construction work on the Wilson's store, Respondent would have no dipute with DeBartolo, Belk's or any tenant in the Mall and would have no cause to handbill at East Lake Square Mall.

18.

At all times material herein Belk's has maintained and operated a retail establishment within Hillsborough County, Florida, which is more particularly located at East Lake Square Mall. That retail establishment is located on land which Belk's owns. That land is comprised of approximately 10.72 acres of property within a larger parcel of property otherwise known as East Lake Square Mall. The property owned by Belk's includes the land upon which the store structure stands and the adjacent sidewalks and parking area.

19.

The Wilson's and Belk's retail stores are competitor establishments. Belk's has no business relationship with Wilson's in any manner, and exercises no control over the construction of the Wilson's store to be located at East Lake Square Mall.

20.

Belk's has no contract with nor does it do business in any manner with High.

21.

The only business relationship between Belk's and DeBartolo is that Belk's pays DeBartolo for maintenance and security of common areas. Belk's does not in any way share or split its revenues from its East Lake Square Mall store with DeBartolo. Belk's pays no money or thing of value to any tenant in the Mall and has no business relationship with any of them, except as provided in any provision of the aforesaid lease, property, or maintenance agreements.

22.

Between the dates of January 8, 1980, and January 17, 1980, Respondent Union handbilled at the entrances to Belk's retail store with the identical handbill to that previously distributed at the mall entrances. The handbilling took place at the three entrances to the store itself, all of which took place upon Belk's property. [Location marked by the O's on plot plan, attached as Joint Exhibit 5]. The handbilling ceased only because of an Order of the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, Florida, enjoining such activity [copy of said Order attached as Joint Exhibit 7].

23.

Neither DeBartolo, Belk's nor any tenant has the ability to remove High as the general contractor on the construction project of the Wilson's store at East Lake Square Mall.

24.

The parties stipulate that the sole issue to be decided by the Board in this case is whether or not Respondent Union violated Section 8(b)(4)(B) of the Act by engaging in the handbilling activity detailed above.

25.

This stipulation is made without prejudice to any objection that any party may have as to the materiality or relevance of any fact stated herein.

26.

Counsel for the General Counsel moves to amend the Complaint to conform to the facts recited above.

Florida Gulf Coast Building Trades Council, AFL-CIO

Dated: 4/2/80 By: /s/ Richard H. Frank
Attorney for Florida Gulf Coast Building Trades Council, AFL-CIO, Respondent

The Edward J. DeBartolo Corporation

Dated: 4/2/80 By: /s/ Mark E. Levitt
Attorney for the Edward J. DeBartolo Corporation, Charging Party

The General Counsel

Dated: 4/2/80 By: /s/ Steven L. Sommers
Counsel for the General Counsel

JOINT EXHIBIT 1

INDEX OF LEASE

Between

and

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ARTICLE III—Minimum Rent

Lessee shall pay to Lessor as Minimum Rent for the Demised Premises the sum of _____ Dollars ($_____) per annum in equal monthly installments of _____ Dollars ($_____) each, all in advance, on the first day of every calendar month during the term hereof. If the term of this Lease shall commence on a day other than the first day of the month, Lessee shall pay Minimum Rent equal to one-thirtieth (1/30th) of the monthly Minimum Rent multiplied by the number of rental days of such fractional month. In the event any installment of Minimum Rent or other charges accruing under the Lease shall become overdue, a "Late Charge" of five cents (5¢) per each dollar so overdue may be charged by Lessor for the purpose of defraying the expense incident to handling such delinquent payment.

If the Shopping Center shall at any time during the term of this Lease, contain in excess of _____ department stores, the Minimum Rent herein provided for shall automatically be increased ten percent (10%) upon the date each additional department store in excess of 60,000 square feet opens for business.

ARTICLE IV—Percentage Rent

1. In addition to the payment of Minimum Rent, Lessee shall pay to Lessor for each Lease Year of the term hereof as Percentage Rent, an amount, if any, equal to ____ percent (____%) of Adjusted Gross Sales made at, in, on or from the Demised Premises during such Lease Year in excess of _____ (hereinafter referred to as "Percentage Break Point"). In the event of a Partial Lease Year, the Percentage Rent will be an amount, if any, equal to ____ percent (____%) of Adjusted Gross Sales made at, in, on or from the Demised Premises during such Partial Lease Year in excess of the

Percentage Break Point which shall be proportionately reduced based upon the period of time contained in such Partial Lease Year. The Percentage Break Point for such Partial Lease Year shall be determined by multiplying the Percentage Break Point for the first lease Year by a fraction the numerator of which shall be the number of days contained in such Partial Lease Year and the denominator of which shall be 365 days.

2. "Adjusted Gross Sales", as used herein, shall mean the amount of gross sales, income, receipts, revenues and charges of, in connection with and for all merchandise, services or other operations or businesses sold or rendered at, in, on or from the Demised Premises by Lessee or any subtenants, licensees or concessionaires, whether for cash or on a charge, credit or time basis, without reserve or deduction for inability or failure to collect, including, but not limited to, such sales and services (a) where orders originate and/or are accepted by Lessee in the Demised Premises but delivery or performance thereof is made from or at any place other than the Demised Premises; (b) pursuant to mail, telegraph, telephone or other similar orders received or filled at or in the Demised Premises; (c) by means of mechanical and other vending machines in the Demised Premises; (d) which Lessee in the normal and customary course of business would credit or attribute to its business upon the Demised Premises or any part or parts thereof, adjusted by the deduction, if originally included in gross sales or exclusion, as the case may be, from gross sales of the following, provided that separate records are maintained for such deductions or exclusions: (a) amounts of refunds, allowances made on merchandise claimed to be defective or unsatisfactory or discounts to customers, provided that if such refunds, allowances or discounts are in the form of credits to customer, such credits shall be included in gross sales when used; (b) exchanges of merchandise between stores of Lessee where such exchanges are made solely for the operation of Lessee's business and not for the purposes of consummating a sale which has been made

at, in, on or from the Demised Premises and/or for the purpose of depriving Lessor of the benefit of such sale which otherwise would have been made at, in, on or from the Demised Premises; (c) returns to shippers and manufacturers for credit; (d) sale of trade fixtures or store operating equipment after use thereof in the conduct of Lessee's business in the Demised Premises; (e) all sums and credits received in settlement of claims for loss or damage to merchandise; and (f) amount of any excise or sales tax levied upon retail sales and payable over to the appropriate governmental authority provided that specific record is made at the time of each sale of the amount of sales tax, and the amount thereof is expressly charged to the customer.

3. Percentage Rent for each Lease Year shall become due and payable either thirty (30) days after the last day of each Lease Year or on the 15th day of the month immediately following the month during which said Adjusted Gross Sales exceeds the Percentage Break Point for such Lease Year and thereafter shall be paid monthly on all additional Adjusted Gross Sales made during the remainder of such Lease Year, whichever occurs first. Percentage Rent for a Partial Lease Year shall become due and payable thirty (30) days after the last day of such Partial Lease Year. Lessee, or Lessee's store manager or designated representative shall submit to Lessor's mall manager at the Shopping Center, on or before the 5th day of each month of each Lease Year or Partial Lease Year, a written unaudited statement showing Lessee's gross sales, itemized deductions and exclusions for the preceding calendar month, signed by Lessee, or Lessee's store manager or designated representative. In addition to the foregoing, Lessee shall submit to Lessor, on or before the 30th day following the end of each Lease Year and Partial Lease Year, a written audited statement showing Lessee's gross sales, itemized deductions and exclusions for the preceding Lease Year or Partial Lease Year, signed by Lessee and certified under oath to be complete and

correct. Within fifteen (15) days after the request of Lessor, Lessee shall submit to Lessor a written audited statement showing Lessee's gross sales, itemized deductions and exclusions for the preceding three (3) calendar months, signed by Lessee and certified under oath to be complete and correct. Lessor shall not request such statements more than four (4) times during any Lease Year or Partial Lease Year. If Lessee shall fail to prepare and deliver any such statement of gross sales required herein, Lessor, in addition to other rights or remedies it may have and upon ten (10) days notice to Lessee, may elect to make an audit of all books and records of Lessee, including Lessee's bank accounts, and to prepare the statement or statements which Lessee has failed to prepare and deliver. Such audit shall be made and such statement or statements shall be prepared by an accountant selected by Lessor. The statement or statements so prepared shall be conclusive on Lessee, and Lessee shall pay on demand all expenses of such audit and of the preparation of any such statements and all sums, if any, as may be shown by such audit to be due as Percentage Rent.

4. Lessee shall keep upon the Demised Premises or at its principal office, books and records in accordance with generally accepted accounting principles consistently applied in which shall be recorded Adjusted Gross Sales for the Demised Premises. The books and records of account shall also include all federal, state and local tax returns and all pertinent original sales records of Lessee relating to Lessee's sales. Pertinent original sales records shall be separately maintained for the Demised Premises and shall include: (a) daily dated cash register tapes, including tapes from temporary registers; (b) serially numbered sales slips; (c) the originals of all mail orders at and to the Demised Premises; (d) the original records of all telephone orders at and to the Demised Premises; (e) settlement report sheets of transactions with subtenants, concessionaires and licensees; (f) the original records showing that

merchandise returned by customers was purchased at the Demised Premises by such customers; (g) memorandum receipts or other records of merchandise taken out on approval; (h) Lessee's bank accounts [separate bank account(s) shall be maintained for receipts from the Demised Premises and no receipts and/or refunds from any other source shall be deposited in such account(s)]; (i) daily and/or weekly transaction reports; and (j) such other sales records, if any, which would normally be examined by an independent accountant pursuant to accepted auditing standards in performing an audit of Lessee's sales. Such books and records shall be open to the inspection of Lessor and Lessor's duly authorized agents at all reasonable times, during business hours, at any time during the term of this Lease and for a period of at least one (1) year after the termination of this Lease. If Lessor should make an audit of Lessee's records and Lessee's gross sales statement should be found to be understated by more than two percent (2%) in any Lease Year, then Lessee, in addition to paying the Percentage Rent due, if any, for such understatement, shall pay to Lessor the cost of audit. The cost of such audit shall be determined on a time and expense basis and the rate per hour shall not exceed that charged for similar personnel by a national firm of independent Certified Public Accountants.

5. If Lessee shall fail to pay Percentage Rent in an amount equal to at least twenty-five percent (25%) of the annual Minimum Rent payable pursuant to Article III of this Lease in at least one (1) of the first five (5) Lease Years of the term of this Lease, then Lessor may elect to terminate this Lease by notice to Lessee given within six (6) months after the end of the fifth Lease Year and this Lease shall terminate and be null and void ninety (90) days after delivery of such notice; provided, however, Lessee may render such notice of termination inoperative if Lessee shall, within thirty (30) days after receipt of such notice, agree in writing to increase the Minimum Rent payable for the sixth Lease Year and each Lease Year thereafter to an

amount equal to one hundred twenty-five percent (125%) of the Minimum Rent payable for the sixth Lease Year and each Lease Year thereafter.

* * *

ARTICLE VII—Lessee's Work and Approval of Lessee's Plans and Specifications

1. Promptly after Lessor notifies Lessee that the shell of the Demised Premises is ready for commencement of Lessee's work, Lessee shall commence and thereafter complete with due diligence its construction work and installation of fixtures in accordance with its construction obligations set forth in Exhibit "A", Part II, "Lessee's Work Done at Lessee's Expense", annexed hereto and in accordance with its Preliminary Plans and Specifications and its Working Plans and Specifications, as provided for herein. If Lessee shall neglect, fail or refuse to commence its work as aforesaid and thereafter neglects, fails or refuses to diligently proceed with and complete its work, then Lessor, in addition to other rights or remedies it may have and, after thirty (30) days notice to Lessee, may (a) complete Lessee's work at Lessee's expense and thereupon commence the term of this Lease, (b) commence the term of this Lease and all of Lessee's payment obligations hereunder, notwithstanding the incompletion of Lessee's work, or (c) declare this Lease cancelled and of no further force and effect.

2. Lessee may, but only with the consent of Lessor, enter the Demised Premises for preliminary work prior to the completion of Lessor's work, provided that Lesssee's work shall be done in such manner so as not to interfere with the completion of Lessor's work, and provided also that Lessee's work does not interfere with any of Lessor's labor agreements.

3. Lessee shall furnish to Lessor all certificates and approvals with respect to work done by Lessee or on Lessee's behalf that may be required from an authority for the issuance

of a certificate of occupancy and Lessor shall have no responsibility or liability whatsoever for any loss or damage to any fixtures or equipment installed or left in the Demised Premises and Lessee's entry on and occupancy of the Demised Premises prior to the commencement of this Lease shall be governed by and subject to all the provisions, covenants and conditions of this Lease other than those requiring the payment of Minimum Rent and other charges, except utility charges.

4. Lessee shall furnish Preliminary Plans and Specifications incorporating Lessee's construction obligations under Exhibit "A" for Lessor's prior approval within fifteen (15) days after Lessor's architects provide Lessee with an Outline Plan for the Demised Premises. Within thirty (30) days after approval by Lessor of Lessee's Preliminary Plans and Specifications, Lessee shall submit Working Plans and Specifications for Lessor's review and prior approval. The approval by Lessor of the Preliminary Plans and Specifications and the Working Plans and Specifications shall not constitute the assumption of any liability on the part of Lessor for their compliance or conformity with applicable building codes and the requirements of this Lease or for their accuracy, and Lessee shall be solely responsible for such plans and specifications.

5. Lessee may erect illuminated signs on the interior mall front of the Demised Premises and shall maintain said signs in a good state of repair and save Lessor harmless from any loss, cost or damage as a result of the erection, maintenance, existence or removal of the same; and shall repair any damage which may have been caused by the erection, existence, maintenance or removal of such signs. All signs shall be in accordance with Lessor's Sign Specifications, a copy of which will be attached to the Outline Plan and shall be approved in writing by Lessor. Upon vacating the Demised Premises, Lessee shall remove all signs and repair all damage caused by such removal.

ARTICLE VIII—Use of Premises

1. Lessee shall operate its business in the Demised Premises during the term of this Lease under the name _____ and the Demised Premises shall be occupied and used for the purpose of _____

_____

_____

_____

and for no other purpose.

2. Lessee shall not abandon or leave vacant the Demised Premises, shall not permit, license, or suffer the occupancy of any other party in the Demised Premises and shall:

(a) Keep the Demised Premises continuously and uninterruptedly open for business at least from 10:00 a.m. to 9:30 p.m. Monday through Saturday and during such hours on Sunday that at least one (1) department store in the Shopping Center and fifty percent (50%) of the other tenants in Lessor's parcel are open for business, unless prevented from doing so by strikes, fire, casualty or other causes beyond Lessee's control.

(b) Conduct no auction, fire or bankruptcy sales or similar practice.

(c) Display no merchandise outside the Demised Premises nor in any way obstruct the malls or sidewalks adjacent thereto and store all trash and refuse in appropriate containers within the Demised Premises and attend to the daily disposal thereof in the manner designated by Lessor. Lessee shall not burn any trash or rubbish in or about the Demised Premises or anywhere else within the confines of the Shopping Center. Lessee shall not operate a garbage grinder without Lessor's prior consent. If Lessor elects to provide refuse compactor service in the Shopping Center, Lessee shall use said service exclusively for dis-

posal of all waste. In the event compactor service is not provided, Lessee shall use a refuse disposal service approved by Lessor.

(d) Load or unload all merchandise, supplies, fixtures, equipment and furniture and cause the collection of rubbish only through the rear service door or doors of the Demised Premises. No deliveries of any kind shall be made through the front entrance.

(e) Keep the Demised Premises in a careful, safe, clean and proper manner; and not permit any rubbish or refuse of any nature emanating from the Demised Premises to accumulate in the mall areas or rear delivery area.

(f) Not solicit business in the Common Areas or distribute any handbills or other advertising matter in the Common Areas.

(g) Prevent the Demised Premises from being used in any way which will injure the reputation of the same or of the Shopping Center of which it is a part or from being used in any way which may be a nuisance, annoyance, inconvenience or damage to the other tenants or occupants of the Shopping Center, including, without limiting the generality of the foregoing, the operation of any instrument or apparatus or equipment or the carrying on of any trade or occupation which emits an odor discernible outside of the Demised Premises and which may be deemed offensive in the nature or noise by the playing of any musical instrument or radio or television or the use of a microphone, loud speaker, electrical equipment or other equipment which may be heard outside of the Demised Premises.

(h) Display or affix no sign, advertising, placard, name, trademark, insignia, decal, advertising matter or any

other item or items on any exterior door, wall or window or within any display window space in the Demised Premises or within five (5) feet of the front of the Demised Premises in the case of an open storefront, or within any entrance to the Demised Premises. Lessor shall have the right, without notice to Lessee and without any liability for damage to the Demised Premises reasonably caused thereby, to remove any items displayed or affixed in violation of the foregoing provisions.

(i) Abide by all reasonable rules and regulations established by Lessor, from time to time, with respect to the common areas, facilities, improvements and sidewalks.

3. Upon the commencement of the term of this Lease, Lessee shall proceed with due dispatch and diligence to open for business in the Demised Premises and shall thereafter continuously, actively and diligently operate its said business on the whole of the Demised Premises, in a high grade and reputable manner maintaining in the Demised Premises an adequate staff of employees and a full and complete stock of merchandise, during business hours throughout the term of this Lease unless prevented from so doing by fire, strikes or other contingencies beyond the control of Lessee. If Lessee fails to open for business within thirty (30) days after the commencement of the term or fails to thereafter keep the Demised Premises open each business day during the hours specified herein, then Lessee shall pay as rent during each day the Demised Premises are not open or in which such hours are not maintained an amount equal to one hundred twenty-five percent (125%) of the Minimum Rent determined on a per diem basis pursuant to Article III. Said amount shall be in addition to other charges due under this Lease and shall represent the agreed liquidated damages to Lessor as the exact amount of damages to Lessor cannot be ascertained with certainty. The right to receive such liquidated damages shall be in addition to all other rights or remedies Lessor may have.

4. Lessee shall not use, occupy, suffer or permit the Demised Premises or any part thereof to be used or occupied for any purpose contrary to law or the rules or regulations of any public authority or the requirements of any insurance underwriters or rating bureaus or in any manner so as to increase the cost of insurance to Lessor over and above the normal cost of such insurance for the use above permitted for the type and location of the building of which the Demised Premises are a part. Lessee shall, on demand, reimburse Lessor for all extra premiums caused by Lessee's use of the Demised Premises, whether or not Lessor has consented to such use. Nothing contained herein shall permit a use other than the use hereinbefore provided. Lessee shall promptly comply with all present and future laws, regulations or rules of any county, state, federal and other governmental authority and any bureau and department thereof, and of the National Board of Fire Underwriters or any other body exercising similar function which may be applicable to the Demised Premises, including the making of any required structural changes thereto. If Lessee shall install any electrical equipment that overloads the lines in the Demised Premises, Lessee shall make whatever changes are necessary to comply with the requirements of the insurance underwriters and governmental authorities having jurisdiction thereover.

ARTICLE IX—Merchants Association

Lessee shall become a member of any Merchants association formed by the tenants of the Shopping Center and approved by Lessor, abide by all rules and regulations established by said Merchants Association and maintain such membership. Lessee shall cooperate in any Merchants Association's Shopping Center wide sales and promotions and advertise annually in at least four (4) Shopping Center wide Merchants Association newspaper sections or advertisements as from time to time determined by the Board of Directors of the

Merchants Association. The minimum size of such advertisements shall be either one-eighth (1/8) page in a full-sized newspaper section, or one-fourth (1/4) of a page of a tabloid size advertisement. In addition to the foregoing, Lessee shall pay as its share of the cost of the activities conducted by the Merchants Association the sum of twenty-five cents (25¢) per year for each square foot of Floor Area contained in the Demised Premises, hereinafter referred to as "Merchants Association Payment", payable in advance in quarter annual installments, plus a nonrecurring fee of twenty-five cents (25¢) for each square foot of Floor Area contained in the Demised Premises as an initial membership fee in such Merchants Association. Commencing with the second Lease Year (or first Lease Year in the event of a Partial Lease Year), and each Lease Year thereafter, the Merchants Association Payment shall be adjusted upward or downward in the manner set forth below, but never less than the above amount. The amount of the Merchants Association Payment for each Lease Year, commencing with the second Lease Year (or first Lease Year in the event of a Partial Lease Year), shall be determined as follows: Using the All Items portion of the "Consumer Price Index for All Urban Consumers" (1967=100), published by the Bureau of Labor Statistics of the United States Department of Labor, applicable on the date of this Lease as the denominator and the index number for the first month of each Lease Year thereafter as the numerator and multiplying said resulting fraction times the above stated Merchants Association Payment. In the event that the Bureau of Labor Statistics shall change the base period, the new index numbers shall be substituted for the old index numbers in making the above computation. In the event such Consumer Price Index of the Bureau of Labor Statistics of the United States Department of Labor is discontinued, Lessor shall select another index published by a department or agency of the United States Government to be substituted for the prior index, with any appropriate adjustment required because of the predecessor index. This

procedure shall continue until such time as no such index is so published, at which time Lessor shall reasonably substitute an index prepared by any appropriate government, corporation or other entity.

* * *

ARTICLE XII—Common Areas

1. Lessor hereby grants to Lessee, during the term of this Lease, a nonexclusive use of the Common Areas for pedestrian and vehicular traffic. The Common Areas shall be subject to the exclusive control and management of Lessor and to such rules and regulations as Lessor may, from time to time, adopt and Lessor reserves the right to change the areas, locations and arrangement of parking areas and other Common Areas; to enter into, modify and terminate easements and other agreements pertaining to the maintenance and use of the parking areas and other Common Areas; to close any or all portions of the Common Areas to such extent as may, in the opinion of Lessor's counsel, be legally sufficient to prevent a dedication thereof or the accrual of any rights to any person or to the public therein; to close temporarily, if necessary, any part of the Common Areas in order to discourage noncustomer parking; and to make changes, additions, deletions, alterations or improvements in and to such Common Areas, provided that there shall be no unreasonable obstruction of Lessee's right of ingress to or egress from the Demised Premises.

2. Lessor shall operate, maintain and repair the Common Areas in such manner as Lessor shall in its sole discretion determine. For these services Lessee shall pay its proportionate share of the cost and expense to Lessor of operating, maintaining and repairing the Common Areas (hereinafter referred to as "Common Area Maintenance Costs") during the term of this Lease, including any period during which Lessee shall transact business in the Demised Premises prior to the commencement

of the term of this Lease. For the purposes of this Article, the term "Common Area Maintenance Costs" shall mean all sums incurred in connection with the operation, maintenance and repair of the Common Areas, and shall include, but not be limited to, the costs and expenses of [the following subparagraphs (a) through (j) are for definition only and are not to be construed so as to impose any obligations on Lessor]:

(a) snow, ice, garbage and trash removal; maintenance, repair and replacement of all parking lot surfaces, service areas and courts, including cleaning, sweeping, painting, striping and repaving; maintenance, repair and replacement of sidewalks, curbs, guardrails, bumpers, fences, screens, flagpoles, bicycle racks, Shopping Center identification signs, directional signs, traffic signals, and other traffic markers and signs;

(b) maintenance, repair and replacement of the (i) storm and sanitary drainage systems, including disposal plants and lift stations and retention ponds or basins; (ii) irrigation systems; (iii) electrical, gas, water and telephone systems; (iv) lighting systems (including bulbs, poles and fixtures); (v) emergency water and sprinkler systems; (vi) other utility systems; (vii) heating, ventilating and air conditioning systems; and (viii) security systems, including any utility charges in connection with any of the foregoing systems;

(c) interior and exterior planting, replanting and replacing of flowers, shrubbery, plants, trees and other landscaping;

(d) maintenance, repair and replacement of all portions of the buildings, both interior and exterior, on Lessor's Parcel (excluding the Demised Premises and premises leased to other tenants), including, but not limited to,

floors, floor coverings, ceilings, walls, roofs and roof flashings, canopies, skylights, signs, planters, benches, fountains, elevators, escalators and stairs, fire exits, doors and hardware, windows, glass and glazing;

(e) premiums or contributions for insurance, including, without limitation, liability insurance for personal injury, death and property damage; insurance against liability for defamation and claims of false arrest occurring in and about the Common Areas; workman's compensation; broad form all peril insurance covering the Common Areas in the Shopping Center which may include flood insurance, earthquake insurance, boiler insurance and/or rent insurance [for the purposes of this provision of subparagraph (e), Common Areas shall be deemed to include the Demised Premises and premises leased to other tenants];

(f) maintenance, repair and acquisition cost (rental fees and/or purchase price or in lieu of purchase price, the annual depreciation allocable thereto) of all security devices, machinery and equipment used in the operation and maintenance of the Common Areas, and all personal property taxes and other charges incurred in connection with such security devices, machinery and equipment;

(g) all license and permit fees, and all parking surcharges that may result from any environmental or other laws, rules, regulations, guidelines or orders; the cost of obtaining and operating public transportation or shuttle bus systems as used in connection with bringing customers to the Shopping Center or if required by any environmental or other laws, rules, regulations, guidelines or orders;

(h) the cost of installation and operation of music program services and loudspeaker systems;

(i) personnel, including, without limitation, security and maintenance people on the Shopping Center, the mall manager and assistant mall manager, secretaries and mall management bookeepers (including, without limitation, the payroll taxes and employee benefits of such personnel); and

(j) Lessor's administrative costs in an amount equal to fifteen percent (15%) of the total Common Area Maintenance Costs.

Notwithstanding the foregoing provisions, Common Area Maintenance Costs shall not include:

(a) depreciation (other than depreciation as above specified);

(b) costs of repairing and replacing to the extent that proceeds of insurance or condemnation awards are received therefor; and

(c) costs of a capital nature to the extent they improve the Common Areas beyond their original condition or utility as they may be put from time to time by Lessor.

In calculating Lessee's proportionate share of the Common Area Maintenance Costs, the contributions, if any, paid by department stores and "variety or specialty stores" to Lessor towards Common Area Maintenance Costs shall be subtracted from Common Area Maintenance Costs before determination of Lessee's proportionate share thereof. For the purposes of this Lease, a "variety or specialty store" is an occupant which leases or occupies 15,000 square feet or more of building space in the Shopping Center. If Lessor from time to time acquires, or makes available, additional land for parking or other common area purposes, then Common Areas shall include such additional land.

3. Lessee's proportionate share of the Common Area Maintenance Costs shall be computed by multiplying the total

amount of the Common Area Maintenance Costs each year by a fraction, the numerator of which shall be the Floor Area of the Demised Premises and the denominator of which shall be the average of the total square feet of all building space open for business in Lessor's Parcel (excluding all building space leased to department stores and "variety or specialty stores") on the first day of each month of the calendar year in which such cost was incurred.

Lessee's proportionate share of Common Area Maintenance Costs for each full calendar year and partial calendar year shall be paid in monthly installments on the first day of each calendar month, in advance, in an amount estimated by Lessor from time to time, hereinafter referred to as "Common Area Maintenance Payment". Subsequent to the end of each full calendar year or partial calendar year, Lessor shall notify Lessee of Lessee's proportionate share of Common Area Maintenance Costs for such full calendar year or partial calendar year. Lessor shall include in such notice, a certification of the Common Area Maintenance Costs by an independent Certified Public Accounting firm designated by Lessor, and such certification shall be deemed conclusive as to the actual amount of Common Area Maintenance Costs. The fee for such certification of Common Area Maintenance Costs shall be included in the Common Area Maintenance Costs. If the Common Area Maintenance Payment paid by Lessee pursuant to this Article for any full or partial calendar year shall be less than the actual amount due from Lessee for such year as shown on such notice, Lessee shall pay to Lessor the difference between the amount paid by Lessee and the actual amount due, within ten (10) days after receipt of such notice. If the total amount paid by Lessee for any full or partial calendar year shall exceed the actual amount due from Lessee for such full or partial calendar year, such excess shall be credited against the next Common Area Maintenance Payment due from Lessee to Lessor pursuant to this Article. If the date that the term of this

Lease commences or the date Lessee opens for business in the Demised Premises, whichever date shall first occur, (hereinafter referred to as "Effective Date") is a day other than the first day of the calendar year, or if the term of this Lease shall end on a day other than the last day of the calendar year, then Lessee's proportionate share of Common Area Maintenance Costs shall be billed and adjusted on the basis of such fraction of a calendar year. If the Effective Date occurs in the calendar year during which the Shopping Center initially opens for business, then the Common Area Maintenance Costs for such partial calendar year shall be reduced by a fraction, the numerator of which shall be the number of days from the Effective Date through the following December 31 and the denominator of which shall be the number of days from the date the Shopping Center opened for business through the following December 31st.

4. Lessor shall protect, indemnify and save harmless Lessee against and from all claims, loss, cost, damage or expense arising out of or from any accident or other occurrence on that portion of the Common Areas located on Lessor's Parcel, except for the willful acts or negligence of Lessee, its agents, subtenants, employees, contractors or assignees.

5. Lessor shall provide public liability insurance (either through the purchase of insurance or a funded self-insurance plan) on that portion of the Common Areas located on Lessor's Parcel providing coverage of not less than Five Hundred Thousand Dollars ($500,000) against liability for injury to or death of any one person and One Million Dollars ($1,000,000) for any one occurrence, or in lieu of the foregoing a combined single bond of at least One Million Dollars ($1,000,000).

6. Lessee shall cause it and its employees to park only in the outer areas of the parking lot or such places as provided and designated by Lessor for employee parking. Within ten (10) days after the request by Lessor, Lessee shall deliver to Lessor a

list of Lessee's and its employees' automobiles which such list shall set forth the description of and the state automobile license numbers assigned to such automobiles. Thereafter, Lessee shall advise Lessor of any changes, additions or deletions in such list. If any automobile appearing on said list is parked in any area of the Shopping Center other than the area designated by Lessor at any time after Lessor has given notice to Lessee or Lessee's store manager that the same automobile has previously been parked in violation of this provision, then Lessee shall pay to Lessor the sum of Ten Dollars ($10) per day for each such automobile for each day (or part thereof) it is parked in violation of this provision. Lessee shall pay such sum to Lessor within ten (10) days after receipt of notice from Lessor.

* * *

ARTICLE XVIII—Utilities

1. Lessee shall contract for, in its own name, and shall pay before delinquency, for all utility services rendered or furnished to the Demised Premises, including heat, water, gas, electricity, fire protection, sewer rental, sewage treatment facilities and the like, together with all taxes levied or other charges on such utilities. If Lessor shall supply any such services, or if any such services are required to be paid for by Lessor under a master meter, Lessee shall purchase same from Lessor at charges not in excess of the charges for the service in question made by any public utility corporation or governmental agency supplying such utilities in the area plus an additional ten percent (10%) for Lessor's overhead costs. Any such charges for service supplied by Lessor shall be due and payable within ten (10) days after billings therefor are rendered to Lessee. In no event shall Lessor be liable for the quality, quantity, failure or interruption of such service to the Demised Premises.

2. Lessor may, with notice to Lessee, or without notice in the case of an emergency, cut off and discontinue gas, water,

electricity and any or all other utilities whenever such discontinuance is necessary in order to make repairs or alterations. No such action by Lessor shall be construed as an eviction or disturbance of possession or as an election by Lessor to terminate this Lease, nor shall Lessor be in any way responsible or liable for such action.

* * *

ARTICLE XXV—Quiet Enjoyment

Lessor agrees that if Lessee pays the Minimum and Percentage Rent and other charges herein provided and shall perform all of the covenants and agreements herein stipulated to be performed on Lessee's part, Lessee shall, at all times during said term, have the peaceable and quiet enjoyment and possession of the Demised Premises without any manner of hindrance from Lessor or any persons lawfully claiming through Lessor, except as to such portion of the Demised Premises as shall be taken under the power of eminent domain.

* * *

ARTICLE XXVIII—Changes and Additions to Shopping Center

1. Lessor shall have the exclusive right to use all or any part of the roof over the Demised Premises and exterior walls of the Demised Premises for any purpose; to erect in connection with the construction thereof temporary scaffolds and other aids to construction on the exterior of the Demised Premises, provided that access to the Demised Premises shall not be denied; and to install, maintain, use, repair and replace pipes, ducts, conduits and wires leading through the Demised Premises and serving other parts of the Shopping Center in locations which will not materially interfere with Lessee's use thereof. In addition to the foregoing, Lessor may make any use it desires of the side and rear walls of the Demised Premises, provided that

there shall be no encroachment upon the interior of the Demised Premises. Lessor hereby reserves the right at any time to make alterations or additions to, and to build additional stories on, the building in which the Demised Premises are contained and to build adjoining the same. Lessor also reserves the right to construct other buildings or improvements in the Shopping Center from time to time and to make alterations thereof or additions thereto and to build additional stories on such building or buildings and to incorporate additional land into Lessor's Parcel and build thereon and to construct deck or elevated parking facilities.

2. If at any time (a) Lessor is required by any laws, ordinances, rules or regulations of any governmental agency having jurisdiction over the Shopping Center to provide additional parking in Lessor's Parcel, or (b) Lessor proposes to increase the total rentable building space within the Shopping Center which would require additional parking in the Shopping Center, Lessor may elect to provide such additional parking by constructing deck or elevated parking facilities, hereinafter referred to as "Deck Parking". In the event Lessor so elects, Lessee shall pay its proportionate share of the capital expense of providing such Deck Parking. Lessee's proportionate share shall be determined by (a) multiplying the total capital expense of providing such Deck Parking by a fraction, the numerator of which shall be the Floor Area of the Demised Premises and the denominator of which shall be the total rentable building space in Lessor's Parcel, either existing, or proposed by Lessor, as the case may be, at the time of providing such Deck Parking; and (b) multiplying the figure derived as aforesaid by a fraction, the numerator of which is the number of full calendar months remaining in the term of this Lease, and the denominator of which shall be the number of months required to amortize the permanent financing obtained by Lessor to finance the capital expense of providing such Deck Parking. Lessee shall pay its proportionate share of the capital expense of providing such

Deck Parking in equal monthly installments on the first day of every calendar month during the remaining term hereof, plus interest thereon at the rate of nine percent (9%) per annum.

* * *

ARTICLE XXXIV—Relationship of Parties

Nothing contained in this Lease shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent or of partnership or of joint venture or of any association whatsoever between Lessor and Lessee, it being expressly understood and agreed that neither the computation of rent nor any other provisions contained in this Lease nor any act or acts of the parties hereto shall be deemed to create any relationship between Lessor and Lessee other than the relationship of landlord and tenant.

* * *

EXHIBIT "A"

ALTAMONTE MALL

Construction Exhibit For Shell & Allowance Lease In A Two Story Structure (Upper & Lower Levels).

Description of Landlord (Lessor's and/or Developer) and Tenant (Lessee's) work as follows:

PART I-- LANDLORD'S WORK DONE AT LANDLORD'S EXPENSE

A. *STRUCTURE:* The Landlord will provide a multi-level shell structure constructed in accordance with local building codes.

1. *LOWER LEVEL FLOOR:* Slab on grade, hard troweled finished concrete surface. The Tenant should pay close attention to "open" floor slab areas indicated on Landlord's Blockout Plan of leased

area. These "open" areas were provided by Landlord so that Tenant may complete the toilet installation according to local code requirements. Dowels and keyway shall be provided in these "open" areas by Landlord. (See Page 5 of Exhibit "A")

2. *UPPER LEVEL FLOOR:* Consists of structural framing system and concrete fill with hard troweled finished concrete surface. (See Page 5 of Exhibit "A")

3. *COLUMNS:* Both upper and lower levels, unprimed structural steel shapes.

4. *OVERHEAD STRUCTURE:* Certain areas of the upper level and roof structures have been overdesigned to facilitate installation of condensing and combination roof top units. These areas are indicated in plan view on Landlord's Blackout Plan. All Tenant Unit locations subject to Landlord's final approval.

5. *ROOF:* Shall be insulated built-up roof of a twenty (20) year bonded type with a .15 U Factor.

B. *WALLS AND PARTITIONS:*

1. Exterior walls shall be of masonry or such other materials selected by Landlord.

2. Exterior walls of shell construction are exposed when in Tenant areas.

3. Interior walls between tenants and/or between tenant and corridor shall be exposed wood or metal studs or masonry at Landlord's option. Firewalls shall be provided as required by code.

4. A minimum 3'-0" x 7'-0" hollow metal door and frame with Landlord's standard hardware shall be provided at service/exit corridors at locations designated by Landlord.

C. *FLOORS:* Upper and lower levels, troweled concrete. See PART I—ITEM A—STRUCTURE.

D. *CEILINGS:* Upper and lower level areas will be left exposed to the structural systems overhead.

E. *UTILITIES; VENTILATION AND EXHAUST AIR:* If Lessor elects to provide any such utilities, the following utilities shall be located approximately 6" within the demised premises at locations designated by Landlord:

1. Domestic water
2. Sprinkler supply line
3. Sanitary sewer (below floor for upper level tenants)
4. Electricity (empty conduit only)
5. Telephone (empty conduit only)
6. Fresh air ductwork for ventilation shall be supplied to lower level tenant spaces to satisfy a maximum rate equal to o.l. cfm/square foot. Ductwork for fresh air supply shall be within the tenant space or within the adjoining service/exit corridors. Location and method of supplying fresh air will be determined by Landlord.
7. Exhaust air ductwork will be available for each lower level tenant space to satisfy a maximum exhaust rate of o.l. cfm/square foot. Ductwork shall be within the tenant space or within the adjoining service/exit corridors. Location and method of exhausting air will be determined by Landlord.

PART II— TENANT'S WORK DONE AT TENANT'S EX-EXPENSE

The Tenant's work shall conform to all applicable governing codes and shall include, but not be limited to the following:

Tenant to construct and equip the demised premises in accordance with the following, the requirements of the Tenant Handbook, and complete plans and specifications approved in writing by the Landlord prior to commencement of said construction as provided for in this Lease. The Tenant must follow the provisions of the Landlord's Tenant Handbook in the submission of preliminary and complete construction plans to the Landlord Tenant Handbook will be supplied to Tenant with Landlord's Blockout Plan.

A. *STRUCTURE:*

1. *LOWER LEVEL FLOOR:* Should Tenant desire to locate toilet in areas other than that designated, the Tenant shall fill in the "open" area and remove existing concrete and replace with minimum 4" thick, 3000 psi concrete—23 day—reinforced with #3 bars #12" c/o each way. Any cutting and patching of this lower level slab requires written approval by Landlord before Tenant begins work.

2. *UPPER LEVEL FLOOR:* System is designed to support a total allowable live load (including partitions) of 95 pounds per square foot. No allowance shall be made for reductions allowed by code. The Tenant is required to make all floor penetrations to facilitate his installations. All upper floor penetrations must be clearly shown on Tenant's plans for Landlord's approval. All Floor penetrations shall be completely filled-in to seal the floor to prevent odors or liquid from penetrating the floor.

3. *OVERHEAD STRUCTURE:* Should the over-designed areas provided by Landlord not satisfy Tenant's requirements, structural modifications can be made at Tenant's expense, subject to Landlord's approval. Lower level Tenants are allowed a mis-

cellaneous loading equivalent to 5 pounds per square foot on the upper level floor system.

4. *ROOF:* All Tenant required penetrations of the roofing system shall be held to a minimum. Tenant shall employ a licensed Roofing Contractor to repair and complete all penetrations of the roofing system. Tenant shall provide all openings, reinforcing, curbs, flashings, etc.

B. *WALLS AND PARTITIONS:*

1. Where masonry does not occur, the Landlord will provide only the studs (wood or metal) for the partitions separating one Tenant from another. Each Tenant must furnish and install 5/8" firerated gypsumboard, taped, bedded, airtight against the deck above, on his side of all common dividing partitions.

2. Walls may or may not coincide with column centerlines; columns being thicker than the walls will extend into the Tenant's areas. All treatments, finishes, or furring desired by Tenant shall be by Tenant at Tenant's expense.

3. No deduction in leased area is allowed for columns.

4. Local codes require all demising partitions to be constructed having a one hour rating. Interior partitions shall be constructed of non-combustible materials in accordance with applicable sections of the code. If non-combustible wood is permitted, all material shall bear the Underwriter's Laboratories stamp indicating material is Treated And Labled Combustible material of any nature Will Not be permitted above finished ceilings.

5. The storefront area will be left open between the Tenant's common dividing partitions and mall fin-

ished floor to the under side of the common cornice soffit. The Tenant shall be responsible for constructing a complete storefront the full width and height (including corners, if applicable). Swinging doors not permitted to swing beyond building line. No neutral piers are provided.

C. *FLOORS:*

1. Expansion joints are installed as a necessary function of this structure. These joints do not occur in all Tenant spaces and those spaces in which they occur shall be clearly identified. The expansion joint shall be a complete installation by the Landlord, and it shall be the Tenant's responsibility to install finish floor covering material to this joint in a workmanlike manner.

2. Sanitary cleanouts are installed as a necessary function of the sanitary sewer system. These cleanouts do not occur in all Tenant spaces and those spaces in which they occur shall be clearly identified. The cleanouts shall be a complete installation by the Landlord, and it shall be the Tenant's responsibility to install finish floor covering material to these cleanouts in a workmanlike manner.

D. *CEILINGS:*

1. All interior finishes beyond the exposed structural systems will be by Tenant at Tenant's expense.

2. Certain pipes, conduits, ducts, and utilities are passing through tenant spaces and are supported by the overhead structure. These items service other Tenants and building areas and are engineered to guarantee the Tenant a minimum ceiling height of 10'-0".

3. In addition to the certain pipes, conduits, ducts, etc. covered under item 2 above, lower level tenants agree and recognize that the upper level tenants will have certain pipes, conduits or other related items located in the ceiling space of the lower level tenants leased space. Lower level tenants further agree and recognize that upper level tenants have the right to install the above mentioned pipes, conduits or other related items from within the lower level tenants space.

   The lower level tenant shall cooperate with the upper level tenant for the installation of these items. In the event the lower level tenant's space is "nearing completion", "completed" and/or "opened for business", the upper level tenant shall simplify his installation problems by "initial design", "redesign" or install his items at the hours and times as he and the lower level tenant can agree on.

   In the event the tenants cannot agree to a reasonable solution, Landlord shall arbitrate and the Landlord's judgment shall be final.

4. All pipes, conduits and other related items that upper level tenants install in the ceiling space of the lower level tenants shall be run tight to the structural steel members in order to provide the lower level tenant maximum working space for the installation of his pipes, conduits, ducts, ceilings and/or other related items.

   Exception to items run tight to the structural steel would be pipes or lines required to slope by code or function. In this event, upper level tenants shall, where possible, confine these lines to follow the line of the lower level tenants dividing partitions.

E. *UTILITIES, FRESH AIR, EXHAUST AIR:*

1. Connections to the following utilities, including meters, equipment, hook-up and extensions to make a complete, approved and operating system:
   a. Domestic water
   b. Sprinkler supply line
   c. Sanitary sewer
   d. Electric
   e. Telephone
2. Lower level tenants shall connect to the fresh air ductwork at location provided by Landlord. Required external static pressure of Tenant's air-conditioning unit must be increased a minimum of 0.2″ w.g. to facilitate utilization of the fresh air ductwork.
3. Lower level tenants shall connect to the exhaust system ductwork at location provided by Landlord. Required external static pressure of tenants exhaust fan must be increased a minimum of 0.25″ w.g. to facilitate utilization of exhaust ductwork.
4. Food service operations located on lower level can connect only toilet room exhaust systems to the exhaust system provided. However, exhaust and make-up air systems from kitchen, preparation, and other special exhaust systems shall be extended vertically thru the roof at a location designated by Landlord.
5. Beauty salons, pet shops or any other areas on lower level which require special exhaust and make-up air systems shall be responsible for providing all necessary equipment and materials to accommodate these systems. These special exhaust systems will not be

permitted to connect to exhaust ductwork provided by Landlord but must be extended thru roof. System design subject to approval of Landlord.

6. Penetrating exterior walls for mechanical equipment will not be permitted.

7. Upper level tenants shall satisfy fresh air and exhaust requirements by carrying their systems thru the roof and terminating them with appropriate devices to satisfy design requirements. Roof penetrations shall be kept to a minimum.

8. Lower level tenants must run sanitary sewer vents to the vent stub provided by Landlord within leased space. Upper level tenants will extend vent(s) from their plumbing and thru roof as required.

F. *HEATING, VENTILATING AND AIR-CONDITIONING:*

1. Tenant shall design the heating, ventilating and air-conditioning system in accordance with the following minimum design requirements:

   a. Cooling calculations shall be based on maintaining 78°F dry bulb and 50% relative humidity inside with Ashrae design conditions (2½% column) outside. Internal loads shall be based on actual light loads, equipment loads (if any) and minimum occupancy of 50 square foot per person based on aggregate leased area or actual seating capacity, whichever is larger. Outside air load shall be based on o.l. cfm/square foot or total exhaust air, whichever is larger.

   b. Heating calculations shall be based on maintaining 70°F dry bulb inside with Ashrae design condition (99% column) outside.

2. Air Distribution System:

   a. The Tenant shall provide a complete air-conditioning system in tenant's space. Two types of systems shall be furnished depending on the tenant's location in the center. One system will consist of a fan and coil air handling unit complete with matchin , condensing unit, piping, automatic temperature controls, supply, return and outside air duct-work with required grilles, registers, diffusers, and fire dampers when required. The other type of system used shall be a roof mounted package unit complete with automatic temperature controls, supply, return and outside air ductwork with required grilles, registers, diffusers and fire dampers when required. The type of system to be utilized shall be as follows:

      1. Lower Level—Fan—Coil

      2. Upper Level—Fan—Coil or roof top package

   b. Fan and coil units shall be located in an accessible manner in the tenant's space. Units shall be suspended from the structural steel in ceiling space within practical physical limits. Larger units shall be floor mounted when suspension is impractical or when weight dictates.

   c. Roof mounted equipment (package and condensing units) shall be located over extra steel provided by Landlord (unless otherwise designated).

   d. Roof mounted equipment (package and condensing units) shall be located on prefabricated unit curbs or equipment supports. Mounting systems requiring roof penetrations or wood runners will not be permitted.

e. Show windows shall be air-conditioned or ventilated.

G. *PLUMBING:* All plumbing and fixtures including a minimum six (6) gallon water heater for toilet rooms.

H. *TOILET FACILITIES:* Complete toilet rooms separate for each sex shall be provided, equipped with a floor drain and all required fixtures, partitions, floor and wall finishes, ventilation, etc. In the event that the occupancy requires only one toilet room, rough-in provisions shall be made for the second toilet room.

I. *SPRINKLER SYSTEM:* Complete sprinkler system including all branch lines, heads, etc. System subject to Landlord's, Landlord's Insurance Company and State Rating Bureau approval.

J. *ELECTRIC EQUIPMENT:* All light fixtures, meters, wiring, service, lamps and equipment including installation, hook-up and support. Lighting fixtures with exposed fluorescent tubes not permitted in sales areas or areas accessible to the public.

K. *TELEPHONE EQUIPMENT:* All conduits for telephone wires. Tenants shall make all necessary arrangements with telephone company for service.

L. *SPECIAL EQUIPMENT:* Alarm systems or other protective devices; public address system; fire extinguishers; conveyors; elevators; escalators; dumb waiters; timeclocks; delivery door buzzers; storm and screen doors; storm enclosures; dry chemical fire protection systems; pilot light for heating, ventilating and air-conditioning equipment, etc.

M. *ROOF OPENINGS:* All roof openings, reinforcing, curbs, flashing, etc. for heating, ventilating, air-conditioning, plumbing and electrical equipment.

N. *SIGNS:* Shall be in accordance with Landlord's sign restrictions.

O. *FIXTURES:* All store fixtures, cases, paneling, cornices, etc..

P. Tenant agrees that only Union Labor affiliated with the A.F.L./C.I.O. Building Trades will be used in performance of Tenant's work.

Q. Tenant and/or his contractor and/or subcontractors to obtain and pay for all permits and comply with all building codes, ordinances, O.S.H.A. regulations, regulations and requirements of Fire Insurance Rating Bureau. Landlord's approval of plans does not release Tenant from this obligation.

R. Tenant agrees to require his contractor and/or subcontractors to furnish Landlord evidence of adequate insurance coverage prior to Tenant's contractors performing any work in Tenant's premises, and Tenant agrees to indemnify and hold harmless Landlord from and against any claims, actions or damages resulting from acts or neglects of Tenant, his agents, employees, contractors or subcontractors in the performance of Tenant's work.

S. Tenant and/or his contractors and/or subcontractors are limited to performing their work including any office or storage for construction purposes within the demised premises only. Tenant and/or his contractors and/or subcontractors shall each be responsible for daily removal from the project of all trash, rubbish and surplus materials resulting from construction, fixturing and merchandising of the demised premises. The Tenant is cautioned against having trash accumulated within his space. Should this develope, Landlord's Project Manager will remove Tenants, and Tenant's contractors trash and the charge will be 1.5 times Landlord's cost.

T. Tenant and/or his contractors and/or subcontractors are responsible for temporary utilities for their work including payment of utility charges.

Landlord has made provision for temporary electric within the Mall, Tenant and/or his contractors may avail themselves of this temporary service under the following conditions:

1. That service is available only during Landlord's working hours.
2. That termination of this service is at Landlord's sole election.
3. Service charge is $100.00 per month.
4. One store—One hook-up.
5. If Landlord does not elect to provide service from said temporary, Tenant must make his own arrangement for same.

U. Upon approval by Landlord of Tenant's working plans, Tenant shall cause construction to promptly commence and will use every effort to cause the demised premises to be completed in time for the Grand Opening date of the project unless otherwise dictated by lease.

V. Landlord will require Tenant to erect temporary barricades to close off the demised premises from the mall until Tenant's heating and air-conditioning system is operative; or, to screen Tenant's premises from public view during construction if the mall is open to the public. Said temporary barricade or screen to be constructed and painted in accordance with Landlord's plans that are in the possession of the Resident Project Manager.

W. The Tenant and/or his contractor must present to the Landlord's Project Manager at the project one (1) complete set of working drawings and specifications approved by the Landlord and applicable governing authorities before permission will be given to start construction in the demised premises.

PART I—A1 (Cont'd)

Floor slabs for this project will be placed on a continuing and sequential basis as scheduled with *all* slab work for the entire project being completed well in advance of the center opening. Wherever possible, forty-five (45) days written notice will be given to each lower level tenant by Landlord prior to placing the concrete slab to permit installation of electrical floor boxes, conduits, piping and other related items. These items must be set in place within this forty-five (45) day period.

If the lower level Tenant is unable to complete this installation within this period, the slab will be placed regardless. The Tenant, at his own expense, will then be required to cut and channel the slab as necessary, install his electrical floor boxes, conduits, piping and other related items and repair the slab to accept his floor covering material.

PART I—A2 (Cont'd)

This structural floor of composite design will be placed prior to Tenant starting construction. Depressions in the slab for carpeting, terrazzo, etc. can not be permitted. Electrical floor boxes must be installed by core drilling through the concrete slab to the lower level tenant's ceiling space. No piping, conduits and other related items will be permitted to be placed in the concrete slab or on the steel decking.

Conduit for electrical floor boxes, piping and other related items must be run tight to the structural in the lower level tenant's ceiling space; refer to Part II-D Ceilings of the lease exhibit.

JOINT EXHIBIT 2

LEASE

BY AND BETWEEN

EASTLAKE SQUARE ASSOCIATES

and

H. J. WILSON CO., INC.

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LEASE

THIS LEASE, made as of the 7th day of August, 1979, by and between EASTLAKE SQUARE ASSOCIATES, a Florida General Partnership composed of Eastlake Square, Inc., a Florida corporation, having its principal office at 7620 Market Street, Youngstown, Ohio 44512, and JCP Realty, Inc., a Delaware corporation, having its principal office at 1301 Avenue of the Americas, New York, New York 10019 ("Landlord"), and H. J. WILSON CO., INC., a Louisiana corporation, having its principal office at 5825 Florida Boulevard, Baton Rouge, Louisiana 70896 ("Tenant");

* * *

ARTICLE III

RENT

Section 1. Commencing with the date as provided in Article XXI, Tenant shall pay to Landlord minimum rent ("Minimum Rent") per annum in the amount of Fifty Thousand and 00/100 Dollars ($50,000.00), payable in equal monthly installments of Four Thousand One Hundred Sixty-six and 67/100 Dollars ($4,166.67) in advance on or before the first day of each calendar month after such date. If Minimum Rent shall be payable for a fraction of a calendar month, it shall be prorated for that month on a daily basis.

Section 2. In addition to Minimum Rent, Tenant shall pay to Landlord, as percentage rent ("Percentage Rent") for each Lease Year (as defined in Section 3 of this Article III) a sum equal to one per cent (1%) of the amount by which Adjusted Gross Sales (as defined in Section 4 of this Article III) in such Lease Year shall have exceeded the product of One Hundred and 00/100 Dollars ($100.00) times the Floor Area (as defined in Section 3 of this Article III) of the structure to be constructed by Tenant hereunder ("Percentage Rent Base"). In the event any Lease Year is less than a full twelve (12) month period ("Partial Lease Year"), Tenant shall pay Percentage Rent for such period, computed as above provided, except that the Percentage Rent Base shall be reduced to a figure obtained by multiplying the Percentage Rent Base by a fraction, the numerator of which shall be the number of days contained in such Partial Lease Year and the denominator of which shall be three hundred sixty-five (365). In the event that the Improvements shall be completely or substantially closed to business with the public for any period of time for any reason other than regularly scheduled daily or weekly closing periods, Percentage Rent Base for the Lease Year in which such closing shall have taken place shall be reduced or abated in the same manner as for a Partial Lease Year.

* * *

Section 4. "Adjusted Gross Sales", as such term is used herein, shall mean the total amount of gross sales, income, receipts, revenues and charges of, in connection with and for all merchandise, services or other operations or business sold or rendered at, in, on, or from the Demised Premises and Improvements by Tenant or by any subtenants, licensees or concessionaires (whether or not such entities are permitted under the terms of this Lease), whether for cash or on a charge, credit or time basis, without reserve or deduction for inability or failure to collect, and including, but not limited to, sales and services (a) where orders originate and/or are accepted by Tenant on the Demised Premises but delivery or performance thereof is made from or at any place other than the Demised Premises; (b) pursuant to mail, telegraph, telephone or other similar orders received or filled at or in the Demised Premises; (c) by means of mechanical and other vending machines in the Demised Premises, except those used primarily by employees; (d) which Tenant in the normal and customary course of business would credit or attribute to its business upon the Demised Premises or any part or parts thereof. All of the foregoing shall be adjusted by the deduction, if originally included in gross sales, or exclusion, as the case may be, from gross sales of the following, to the extent that separate records are maintained for such deductions or exclusions: (a) amounts of refunds and allowances made on merchandise claimed to be defective or unsatisfactory, provided that if such refunds or allowances are in the form of credits to customers, such credits shall be included in gross sales when used; (b) exchanges of merchandise between stores of Tenant where such exchanges are made solely for the operation of Tenant's business and not for the purpose of consummating a sale which has been made at, in, on, or from the Demised Premises and/or for the purpose of depriving Landlord of the benefit of such sale which otherwise would have been made at, in, on, or from the

Demised Premises; (c) returns to shippers and manufacturers for credit; (d) sales of trade fixtures or store operating equipment after use thereof in the regular conduct of Tenant's business in the Demised Premises; (e) sums and credits received in settlement of claims for loss or damage to merchandise; (f) amounts of any excise or sales tax levied upon retail sales and payable over to the appropriate governmental authority provided that specific record is made at the time of each sale of the amount of tax, and the amount thereof is expressly charged to the customer; (g) bad debts, including credit card charge-backs not later credited and uncollected checks not later collected, not in excess of one per cent (1%) of Tenant's total sales; (h) interest received on customer charge accounts; and (i) actual credit card company service charges, but not in excess of the greater of three per cent (3%) or one-half (1/2) of the actual credit card company service charge.

* * *

ARTICLE IV

TAXES AND OTHER CHARGES

Section 1. Tenant shall pay and discharge punctually as and when the same shall become due and payable, all taxes and assessments, water rents, sewer rents and charges, duties, impositions, license and permit fees, charges for public utilities of any kind, payments and other charges of every kind and nature whatsoever, ordinary and extraordinary, foreseen or unforeseen, general or special, in said categories, together with any interest or penalties lawfully imposed upon the late payment thereof, which, pursuant to present or future law or otherwise, during the term hereby granted shall have been or shall be levied, charged, assessed, imposed upon or grow or become due and payable out of or for or have become a lien on the Demised Premises or any part thereof, the Improvements and the property therein and the appurtenances thereto, the

rents received by Landlord from the Demised Premises or any use of the Demised Premises and such franchises as may be appurtenant to the use and occupation of the Demised Premises. All the items referred to in this Section 1 are sometimes and hereinafter called "Impositions".

* * *

Section 5. Tenant's Contribution to Impositions for Improvements on the Demised Premises.

* * *

B. If Tenant's Improvements are not separately assessed or if the Impositions applicable thereto cannot be determined from an examination of the tax assessor's records, Landlord shall pay all Impositions to the taxing authority, and Tenant shall reimburse Landlord for its allocable portion determined pursuant to this Section, of the Impositions for any tax year or portion thereof during the period in which Tenant is obligated for the payment of Impositions applicable to its Improvements, within twenty (20) days after Tenant shall have received copies of the tax bills from Landlord with an itemized statement of the allocation to Tenant of Impositions applicable to Tenant's Improvements.

Tenant shall use all reasonable efforts to have Tenant's Improvements separately assessed. In the event that Tenant's Improvements are not separately assessed, but are assessed as part of the Developer Site and the Impositions applicable to Tenant's Improvements cannot be determined from an examination of the tax assessor's records, to both parties' satisfaction as set forth above, the Impositions applicable to Tenant's Improvements shall mean the Impositions assessed with respect to any tax year (during the period in which Tenant is obligated to pay Impositions) against the buildings and improvements located on the Developer Site multiplied by a fraction, the numerator of which shall be the number of square feet of Floor

Area located within the Demised Premises and the denominator of which shall be the average number of square feet of Floor Area during such calendar year in all of the buildings and improvements so assessed which are located on the Developer Site. The allocation formula provided for herein shall not take effect until the first year in which Tenant's Improvements are fully assessed; prior to such time, Tenant shall reimburse Landlord for Impositions applicable to its Improvements as then partially completed, if any.

* * *

ARTICLE V

ASSIGNMENT AND SUBLETTING

Section 1. Except as provided in Section 2 and Section 3 of this Article V, Tenant shall not, voluntarily, involuntarily or by operation of law, sell, mortgage, pledge or in any manner transfer or assign this Lease, in whole or in part, or sublet the whole or any part of the Demised Premises, or permit any other person to occupy same without the consent of Landlord, references elsewhere herein to assignees, subtenants, licensees or other persons notwithstanding, and any of the foregoing shall be of no force or effect. In the event that Tenant requests permission to assign this Lease, sublet the whole or any part of the Demised Premises or to do anything referred to in the immediately preceding sentence, then Landlord may, in its sole and absolute discretion, elect to consent or withhold consent. Subject to Tenant's operating covenant, Tenant shall have the right to sublease any portion of the Demised Premises or to license concessions therein, not to exceed 15,000 square feet, without Landlord's consent. Except as provided in Section 2 of this Article V, any assignment or subletting, even with consent of Landlord, shall not relieve Tenant from liability for payment of rent and other sums herein provided or from the obligation to keep and be bound by all the terms, conditions and

covenants of this Lease. The acceptance of rent from any other person shall not be deemed to be a waiver of any of the provisions of this Lease, a consent to the assignment of this Lease or a subletting of the Demised Premises. The prohibitions and other provisions of this Section 1 of this Article V shall also be applicable with respect to a lease of the Improvements or any part thereof.

Section 2. Subsequent to the period of fifteen (15) years after the Wilson store opens for business in the shopping center ("Initial Operating Period"), Tenant may assign this Lease or sublet the whole of the Demised Premises to any entity ("Permissible Entity") which shall, at the time of the assignment or sublease, meet both of the following requirements:

(a) have a net worth in excess of Twenty Million Dollars ($20,000,000.00); and

(b) operate eight (8) or more Department Stores (as herein defined) in the continental United States. As used in this subparagraph (b), the term "Department Store" shall mean a retail store containing a number of departments for the sale of hard and soft goods and miscellaneous merchandise and such services as are customarily sold and performed by department stores from time to time, including a general line of apparel and housewares, whether or not a full-line of each category is carried, or a catalog store similar to the type to be operated under this Lease by H. J. Wilson Co., Inc.

Tenant shall have the right, without the necessity of obtaining Landlord's consent, to assign this Lease or sublet the Premises to any wholly owned or affiliated or parent corporation, but in the case of an assignment, the original Tenant shall continue as guarantor of Tenant's obligations hereunder. If there shall be an assignment of this Lease or subletting of the Demised

Premises to any wholly owned or affiliated corporation and thereafter as a result of one or more assignments, sales or transfers of the shares of stock of such previously wholly owned or affiliated corporation, H. J. Wilson Co., Inc. does not thereafter own in excess of fifty per cent (50%) of both the voting shares and more than twenty-five per cent (25%) of all shares, the assignments, sales or transfers of those shares which were in excess of the number required to retain controlling interest by H. J. Wilson Co., Inc. shall be deemed to be void and of no force and effect. Notwithstanding the provisions of the immediately preceding sentence, more than fifty per cent (50%) of the voting shares and more than twenty-five per cent (25%) of all shares of stock of any previously wholly owned or affiliated corporation may be owned by either of the following:

(a) a Permissible Entity; or

(b) an entity which shall acquire all of the stock of every corporation operating all of the retail stores of H. J. Wilson Co., Inc., its subsidiaries and affiliates in the State of Florida, but in no event less than four (4) such stores.

In addition to the foregoing, H. J. Wilson Co., Inc. shall have the right to assign this Lease in the event of a merger or a consolidation with another corporation, or in the event of a sale or transfer of all or substantially all of said company's assets without the necessity of obtaining Landlord's prior consent; provided the acquiring or surviving corporation has a net worth at least equal to the greater of (i) Tenant's net worth as of the date of execution of this Lease, or (ii) Tenant's net worth as of the date immediately prior to such assignment. Tenant agrees that it shall notify Landlord of its intention so to do and shall deliver a satisfactory assumption of Tenant's liabilities by such assignee, whereupon Tenant's liability hereunder (except for acts in default occurring prior to such assumption) shall terminate. The prohibitions and limitations upon assignment

and/or subletting of this Lease and the operating covenant of Tenant under Article VI, Section 2, shall not apply to any person, firm or corporation who has succeeded to the interest of Tenant under this Lease by foreclosure or deed in lieu of foreclosure (dation en paiement) or to any assignee of this Lease in connection with an assignment and leaseback or sublease to H. J. Wilson Co., Inc. or an affiliate or subsidiary in the event Tenant's possessory interest shall terminate by reason of a default under the terms of such leaseback or sublease or to the assignees of such person, firm or corporation, except the entire building must be used only for a single store engaged in retail merchandising to the general public.

Section 3. Anything in this Lease to the contrary notwithstanding, Tenant may assign or transfer its interest in this Lease and/or the Improvements, provided it shall simultaneously become vested with a subleasehold estate or similar possessory interest in the Demised Premises by virtue of a sublease made by the assignee, or if, in order to secure an indebtedness, Tenant shall mortgage its leasehold estate and retain a possessory interest in the Demised Premises, in which event the assignee of this Lease or the trustee, beneficiary or mortgagee under any such deed of trust or mortgage shall not be deemed to have assumed or be bound by any of Tenant's obligations hereunder for so long as Tenant shall retain a possessory interest and all obligations shall continue to remain those of Tenant alone. So long as Tenant retains such possessory interest, performance by Tenant of any act required to be performed under this Lease by it or fulfillment of any condition of this Lease by Tenant shall be deemed the performance of such act or the fulfillment of such condition by such assignee, trustee, beneficiary or mortgagee, as the case may be, and shall be acceptable to Landlord with the same force and effect as if performed or fulfilled by such assignee, trustee, beneficiary or mortgagee, as the case may be. Anything in this Lease to the contrary notwithstanding, if any mortgage of the leasehold or

the Improvements is foreclosed or deed delivered in lieu of foreclosure, or if Tenant, having entered into an assignment and subleaseback involving the Demised Premises shall be deprived of possession thereof by reason of its failure to comply with the terms of such subleaseback or the leasehold mortgage, anyone who has acquired or shall thereafter acquire title to the Demised Premises or the Improvements shall hold the same free of any requirement of this Lease that a "Wilson's" catalog showroom department store be operated, but Tenant shall not, in such a case, be deemed released from its obligations under Article VI. Notwithstanding any assignment, nothing contained in this Section 3 or Section 2 (except in the case of a merger or consolidation) shall be deemed to release H. J. Wilson Co., Inc. from liability for the obligations of Tenant. If any mortgage of the leasehold or Improvements is foreclosed or deed delivered in lieu of foreclosure, or if Tenant, having entered into an assignment and subleaseback involving the Demised Premises shall be deprived of possession thereof by reason of its failure to comply with the terms of such leaseback or the leasehold mortgage, any person, firm or corporation succeeding to the possessory interest of Tenant in the Demised Premises shall not be obligated to undertake or perform any duties, obligations or responsibilities of any kind or nature imposed upon Tenant which accrued prior to the date such person, firm or corporation succeeds to such possessory interest, and shall be liable for such duties, obligations and responsibilities of Tenant only so long as such person, firm or corporation retains a possessory interest in the Demised Premises.

ARTICLE VI

USE OF DEMISED PREMISES AND OPERATING COVENANTS

Section 1. Landlord agrees with Tenant that until Tenant is in breach of any of the terms and conditions imposed upon Tenant under this Lease, subject to the provisions of the Operating Agreement, Landlord will comply with any obligation imposed upon Landlord under the provisions of Section 16.1 of the Operating Agreement.

Section 2. Provided, (i) Landlord is not in default of its operating covenant under Section 16.1 of the Operating Agreement, and (ii) any two (2) of J. C. Penney Company, Inc., Montgomery Ward Development Corporation and Belk-Lindsey of Tampa, Florida, are operating department stores in their premises under their respective names, Tenant agrees, for all of the Initial Operating Period, as that term is defined in Article V, Section 2, to operate a typical Wilson's store, having in excess of 50,000 square feet of Floor Area, under the trade name "Wilson's", or such other trade name as is employed by the majority of the catalog showroom department stores operated by H. J. Wilson Co., Inc. and its subsidiary or affiliated corporations in the State of Florida. During the balance of the term, Tenant shall operate or cause to be operated (to the extent permitted by the provisions of Article V) a department store (but not under any specific name) in the Demised Premises containing a customer mall entrance on both levels, vertical transportation within the Demised Premises and not less than 3,000 square feet of retail sales area on the upper level.

Notwithstanding the foregoing, a department store need not be operated during such time as either of the following shall occur subsequent to the Initial Operating Period:

(a) less than two (2) department stores shall be operated on the respective premises now operated by Mont-

gomery Ward Development Corporation, J. C. Penney Company, Inc. and Belk-Lindsey Company of Tampa, Florida, for any reason other than "Force Majeure"; or

(b) less than fifty per cent (50%) of the gross leasable area of the mall shops shall be open for business to the public for a period in excess of six (6) months after specific notice from Tenant to Landlord.

At no time during the term hereof may the Demised Premises be used for other than retail and related purposes.

Section 3. From and after the day on which Tenant shall open for business and throughout the entire balance of the term hereof, Tenant shall, in good faith, continuously, actively and diligently maintain, conduct and operate all of the Improvements on two (2) levels, in a high grade and reputable manner, maintaining in the Demised Premises a full staff of employees, and equipment for the protection of the person and property of the general public, and shall expend all necessary, proper and reasonable efforts consistent with good business practice to that end. The words "continuously", "actively" and "diligently", as used herein, shall mean uninterruptedly at least from 10:00 A.M. to 9:30 P.M. on Monday through Saturday, provided that at least two (2) other department stores in the shopping center and fifty per cent (50%) of the mall tenants on the Developer Site are opened for business; and during such hours on Sunday as the aforesaid department stores and mall tenants are operating. Notwithstanding the foregoing, Tenant shall not be required to operate on any Monday following a Sunday holiday. Any temporary cessation of such operation (other than as may be contemplated or permitted under the provisions of this Lease entitled "Condemnation" and "Damage and Destruction", and in Section 13 of Article XVIII defining "Force Majeure"), for any cause incident to the conduct of a retail catalog department store business or the temporary cessation of such operation because of remodeling of or the

making of Improvements to the Wilson store, at any time shall not be considered as a default under this Article, so long as Tenant is using due diligence to resume operation.

Section 4. Tenant shall conduct no auction, fire or bankruptcy sales or similar practice on the Demised Premises and shall display no merchandise outside the Improvements or the Demised Premises nor in any way obstruct the malls or sidewalks adjacent thereto and shall store all trash and refuse in appropriate containers within the Improvements and attend to regular disposal thereof; use or permit to be used any advertising medium that might constitute a nuisance, such as loudspeakers, sound amplifiers, phonographs or radios which can be heard outside of the Demised Premises. Tenant shall not burn any trash or rubbish in or about the Demised Premises or anywhere else within the confines of the shopping center complex. Tenant shall not operate a garbage grinder without Landlord's prior consent, but may operate a trash compactor.

* * *

ARTICLE VIII

MAINTENANCE AND REPAIRS—ALTERATIONS

Section 1. Tenant shall put, keep and maintain in good order and first-class condition the Demised Premises and the Improvements, including, without limitation, the exterior and interior portions of all doors and windows, electrical, plumbing, heating and air conditioning equipment and facilities, and signs of Tenant, wherever located, permitted by this Lease. In addition, Tenant shall promptly make all repairs, interior and exterior, structural and nonstructural, foreseen and unforeseen, latent and patent, ordinary and extraordinary, howsoever the necessity may occur, and of every kind and nature. All repairs shall be equal to the original in class and quality. Tenant shall keep the Demised Premises and the Improvements in a clean, sanitary and safe condition, free of dirt, rubbish, snow and ice

and obstructions and in accordance with the requirements of all public authorities having jurisdiction thereof. "Repairs" shall include replacements, whenever necessary. Landlord shall not be required to make any repair, maintain anything or provide any facility or service, except as specifically provided herein.

Section 2. Tenant shall not make any exterior or structural alterations, improvements and/or additions ("alterations") to the Demised Premises or the Improvements without first obtaining, in each instance, the consent of Landlord. Alterations shall be made in accordance with all applicable laws and in a good and first-class, workmanlike manner.

Section 3. Reference is hereby made to those portions of Sections 8.1 and 8.2 of the Operating Agreement requiring Landlord (as Developer therein) to perform maintenance work with respect to the Enclosed Mall and the Common Areas (which terms, as used in this Lease, shall have the same respective meanings as in the Operating Agreement). In consideration of Landlord performing such maintenance work, Tenant shall pay to Landlord, commencing on the date Minimum Rent commences, a sum, for each Lease Year of the term hereof, of Fifty Cents ($.50) for each square foot of Floor Area within the Improvements during the first five (5) Lease Years. Such annual sum shall be increased by Ten Cents ($.10) for each such square foot at the end of each period of five (5) years thereafter. The payment for any Partial Lease Year shall be prorated on a daily basis. Such sums shall be payable in equal monthly installments in advance on or before the first day of each calendar month. In the event that Landlord fails to maintain the Enclosed Mall and Common Areas on the Developer Site in accordance with the above requirements, Tenant shall be entitled, at its sole option, after thirty (30) days notice to Landlord, to perform such maintenance in whole or in part and to deduct the cost thereof from its maintenance contribution and from any Percentage Rent which may be due or become due Landlord.

ARTICLE IX

INDEMNITY AND PUBLIC LIABILITY INSURANCE

Section 1. Tenant shall pay and protect, defend, indemnify and save harmless Landlord from and against all liabilities, damages, costs, expenses (including any and all attorney's fees and expenses of Tenant and Landlord), fines, penalties, causes of action, suits, claims, demands and judgments, which may be imposed upon or incurred by or asserted against Landlord and/or against the Demised Premises by reason of any of the following occurring during the term of this Lease, except if and to the extent the same may arise from the negligence of Landlord or any of its agents, contractors, servants, employees or licensees: (i) any work or thing done in, on or about the Demised Premises or the Improvements; (ii) any use, possession, occupation, condition, operation, maintenance or management of the Demised Premises or the Improvements or any part thereof; (iii) any negligence or other wrongful act or omission on the part of Tenant or any of its agents, contractors, servants, employees, licensees or invitees; (iv) any accident, injury or damage to any person or property occurring in, on or about the Demised Premises or the Improvements or any part thereof; and (v) Tenant's violation of any agreement or condition of this Lease and/or of statutes, laws, ordinances or governmental regulations affecting the Demised Premises, the Improvements or the ownership, occupancy or use of them. Tenant is and shall be in exclusive control and possession of the Demised Premises and the Improvements as provided herein and Landlord shall not in any event whatsoever (except for negligence of Landlord, its agents, contractors, servants, employees or licensees) be liable for any injury or damage to any property or to any person happening on or about the Demised Premises or the Improvements or for any injury or damage to any property of Tenant, or of any other person contained therein. The provisions hereof permitting Landlord to enter and inspect the Demised Premises and the Improvements are made for the purpose of enabling Landlord to be informed as to whether

Tenant is complying with the agreements, terms, covenants and conditions hereof, and to do such acts as Tenant shall fail to do.

* * *

ARTICLE XVIII

MISCELLANEOUS

* * *

Section 14. Title to the Wilson store and all other Improvements to be erected by Tenant on the Demised Premises (except any part of the Enclosed Mall thereon) shall be and remain in Tenant during the term of this Lease. Upon the termination of this Lease, whether by expiration of term or otherwise, title to the Wilson store and all other Improvements erected by Tenant shall be automatically transferred to Landlord without any further act by the parties hereto. However, Tenant, on demand, shall execute such further assurances of title to the Wilson store and all other Improvements erected by Tenant as Landlord may request.

* * *

ARTICLE XXII

CONSTRUCTION OF TENANT'S IMPROVEMENTS

Section 1. Plans and Specifications. Tenant covenants and agrees with Landlord that, pursuant to the provisions of Exhibit "E", it will cause to be designed and constructed upon the Demised Premises the Wilson store with an exterior finish substantially identical to that of the existing mall, and the Improvements enumerated in said Exhibit "E" attached hereto and made a part hereof. Tenant shall obtain and submit to Landlord preliminary design schematics showing the elevations and exterior appearance of the Wilson store no later than

September 15, 1979. Upon approval by Landlord, which approval shall not be unreasonably withheld, Tenant shall promptly, at its own expense, obtain final plans and specifications which shall be substantially in accord with the preliminary design schematics approved by Landlord. Tenant shall have the right to make any changes that may be required to make the Wilson store or any facilities or Improvements in the Wilson store suitable for the use of the building by Tenant as proposed herein, provided that such changes are consistent with the preliminary design schematics. The final plans and specifications for the Wilson store may be submitted in stages to Landlord for approval beginning no later than sixty (60) days following the approval of the preliminary design schematics by Landlord and the last plans shall be submitted to Landlord for approval no later than one hundred twenty (120) days after approval of said design schematics. As used herein, "final plans and specifications" shall mean definite architectural and engineering plans and specifications, including all necessary working drawings and specifications and providing for first-class workmanship and materials in detail sufficient to permit construction in full of the department store building and other facilities and Improvements referred to herein.

Section 2. Landlord's Approval. Landlord shall, within thirty (30) days after the receipt of any plans for approval, give Tenant notice of its approval or disapproval thereof, specifying in the latter event the reasons therefor, which approval shall not be unreasonably withheld. Landlord's failure to give notice of its approval or disapproval within thirty (30) days shall be deemed to constitute its approval. Any reason for disapproval of any plans and specifications shall not be inconsistent with this Lease. Tenant will, within thirty (30) days after receipt of a notice of disapproval, as aforesaid, appropriately amend and modify said plans so as to reflect all changes, modifications and corrections which Landlord requires hereunder and upon completion thereof to the reasonable satisfaction of Landlord, the plans as so amended and modified, shall thereupon be approved in writing by Landlord.

After approval of any such plans no changes may be made therein which affect the exterior design or appearance of the Wilson store or other facilities without Landlord's approval. The Improvements constructed by Tenant on the Demised Premises shall be and remain the property of Tenant during the term of this Lease.

* * *

ARTICLE XXIV

MERCHANTS' ASSOCIATION

Section 1. Commencing with the opening for business of the Wilson store, Tenant agrees to join the Merchants' Association then formed and to remain a member thereof for the period the Wilson store is operating, provided:

(a) Landlord shall pay at least twenty-five per cent (25%) of the aggregate annual contribution made by all of the members;

(b) tenants occupying at least seventy-five per cent (75%) of the Floor Area in the shopping center and the other department stores join such Association and pay annual dues;

(c) Tenant's annual dues shall not, for the first five (5) years of such membership, exceed the number of square feet of Floor Area in the Wilson store at the commencement of such year, multiplied by Five Cents ($.05). Each succeeding five (5) year period shall provide for a One Cent ($.01) increase per square foot of Floor Area; and

(d) Tenant shall not be bound by the acts or omissions of such Association, the only obligation of Tenant with respect to such Association being to pay dues in conformity with immediately preceding clause (c) hereof.

JOINT EXHIBIT 3

PLEASE DON'T SHOP AT EAST LAKE PLEASE

SQUARE MALL

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done

using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public - the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

FLA. GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO

PLEASE DO NOT LITTER

JOINT EXHIBIT 6

Tampa

December 20, 1979

Mark F. Kelly, Esquire
341 Plant Avenue
Tampa, Florida 33606

RE: Eastlake Square Mall
(Our files 22A, 22B, 22C)

Dear Mark:

This is to confirm our conversation by telephone covering the distribution of a handbill by your client at the DeBartolo Mall at Eastlake Square. I repeat this position statement I made officially yesterday by telephone.

1. If your client will change the language of the handbill to indicate that its dispute is solely with Wilson's Department Stores, its suppliers, or contractors, and not with DeBartolo or any of the other lessees in the Mall.

2. DeBartolo will take no legal action or oppose peaceful distribution of such changed handbill if restricted to the immediate vicinity of the area of the Wilson's construction site. As I told you by telephone, I will have an attorney from our firm meet with you at the mall to work out an agreement as to where the "immediate vicinity of Wilson's construction site" is.

3. DeBartolo will take no action to restrict handbilling as described in paragraph 1 above, at the places where public roads intersect and lead to the DeBartolo property so long as such handbilling is

peaceful and does not interfere with ingress and egress to and from the mall, or otherwise cause a safety problem.

In making the above statement of position, I do not agree that your client has the right to come on our property under any circumstances. However, our client will not attempt to stop or restrict handbilling which is conducted in the manner and in places described in paragraphs 1, 2, and 3 above.

If you have any questions concerning this matter, please feel free to call me.

Sincerely,

W. Reynolds Allen

WRA:tl
bcc: James M. Blue, Esquire
Mr. Arthur D. Wolfcale
Mr. Augustas C. Rigas

Opposition

1

Office - Supreme Court, U.S.
FILED
MAY 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1985

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE EDWARD J. DEBARTOLO CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD and
FLORIDA GULF COAST BUILDING TRADES COUNCIL,
AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner owns and operates East Lake Square Mall; there are approximately 85 tenant stores located in the mall. H.J. Wilson leased land from petitioner and began constructing a department store that would be a part of the mall. Wilson contracted with H.J. High Construction Company as the general contractor to build the new store. Subsequently, Florida Gulf Coast Building Trades Council, AFL-CIO ("the Union") and High became embroiled in a labor dispute concerning wages and fringe benefits. The Union distributed handbills at the four entrances to East Lake Square Mall, asking consumers not to

shop there because "The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits." (Pet. App. 21a-23a.)

Petitioner's tenants at the mall occupy their stores under conditions set forth in a standard lease. Each of them pays petitioner a fixed minimum rent and, in addition, a percentage of all adjusted gross sales over an established yearly figure. The minimum rent increases by 10 percent whenever a new department store of a specified size opens in the mall. The tenants share the cost of maintaining and repairing the mall's common areas, and under the lease the share of existing tenants is reduced with each new tenant. Tenants also pay dues to a merchants' association that is largely devoted to joint advertising and promotional projects. Each tenant agrees not to use its premises in any way that injures the reputation of the mall or interferes with the operations of the other tenants. Through the lease, petitioner is able to exercise control over the tenants' construction work, business hours, signs, employees, and other details of the tenants' use of the premises leased to them. Although Wilson is not a signatory to the standard lease, the company executed a similar lease with petitioner. (Pet. App. 22a.)

2. Petitioner filed unfair labor charges, and the General Counsel of the Board filed a complaint against the Union, charging that the Union had violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(ii)(B)). Following its decision in *United Steelworkers of America, AFL-CIO-CLC* (*Pet, Inc.*), 244 N.L.R.B. 96 (1979), rev'd and remanded, *Pet, Inc.* v. *NLRB*, 641 F.2d 545 (8th Cir. 1981), the Board dismissed the complaint on

the ground that the Union's handbilling was protected by the publicity proviso to Section 8(b)(4).[1]

With an exception not relevant here, the proviso exempts from the ban on secondary boycotts "publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." In *Pet*, the Board explained (Pet. App. 27a) "a union [can] lawfully handbill a neutral employer, urging a total consumer boycott of that employer, 'so long as the primary employer has at some stage produced, in the sense of applying capital, enterprise, or service, a * * * product of the neutral employer.' " Applying this understanding of the proviso in *Pet*, the Board concluded that the relationship between a parent company and its subsidiaries rendered one of the subsidiaries a "producer" of the products distributed by the other subsidiaries, for purposes of the proviso. Similarly, in this case the Board found the relationship between petitioner, the mall tenants, and High sufficient to make High a "producer" (Pet. App. 28a-29a):

> [T]he mutual obligations between the parties and the benefits derived from participation in the mall enterprise reflect the symbiotic nature of the relationship between DeBartolo and its tenants, not unlike the relationship between the operations of a diversified corporation. High's contribution to this enterprise is as an employer

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[1] Member Penello would have remanded the case for a hearing on a factual issue relating to the truthfulness of the handbills, a matter he considered unresolved. He did not address the question whether the handbilling was within the proviso's protection (Pet. App. 29a-30a).

> which applies its labor to a product, i.e., the Wilson's store, from which DeBartolo and its tenants will derive substantial benefit. Consequently, we find as a result of its relationship with Wilson's and the shopping center enterprise that High applies capital, enterprise, and service to that enterprise, and thus that it is a "producer" in the sense that that term is used in the publicity proviso * * *.

3. The court of appeals affirmed, explaining (Pet. App. 12a):

> In light of precedent, the Board's interpretation and application in this case of the publicity proviso is clearly consistent with the Act and is rational. High produces certain products, i.e., the Wilson's store and the mall enterprise, and those products are in turn distributed by DeBartolo and the mall tenants, all of whom had a financial interest in High's work but had no direct relationship with High. That DeBartolo and the mall tenants are not involved in the primary dispute between High and Wilson's does not alter the conclusion: it was clearly Congress's intent to allow coercive pressure of neutral employers in the forms of union handbilling of customers and other pure publicity. See *NLRB* v. *Fruit and Vegetable Packers and Warehousemen, Local 760* [*Tree Fruit*], 377 U.S. at 69-70 * * *.

The court acknowledged that its decision conflicted with that of the Eighth Circuit in *Pet*, but stated that the reasoning of the dissent was more persuasive than that of the majority in that case (Pet. App. 14a).[2] The court denied petitioner's request for re-

[2] District Judge Britt, sitting by designation, dissented (Pet. App. 15a-18a).

hearing *en banc*, four judges dissenting (*id.* at 33a-34a).

4. The court of appeals correctly concluded that the Board's interpretation of the publicty proviso to Section 8(b)(4) "is clearly consistent with the Act and is rational" (Pet. App. 12a). In *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964), this Court unanimously upheld the Board's position that an employer need not be involved in the physical creation of a product in order to be a "producer" within the meaning of the proviso. The guiding principles for interpreting the scope of the proviso are as follows (*id.* at 55; footnote omitted):

> The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. * * * It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with [a] manufacturer or processor. * * * There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

In light of the relationships between petitioner, its tenants, and the contractor, the conclusion that the Union's advertisement of its dispute with the contractor was protected is fully consistent with these principles. The Union engaged in secondary activity that would have been prohibited by Section 8(b)(4)(B), if, for example, it had picketed the mall. To conclude that the handbilling in this case is protected by the proviso makes the proviso coextensive with "the prohibition to which it is an exception."

Furthermore, by attracting additional customers to the mall, the Wilson store will generate a larger market for the wares of all the tenants, who are engaged in a common enterprise with mutual obligations in order to enjoy the benefits the mall makes possible. High's contribution of labor to the creation of a larger market for the tenants' products can, in these circumstances, be viewed as making it a "producer" of those products. See *Great Western Broadcasting Corp., d/b/a KXTV* v. *NLRB*, 356 F.2d 434, 436 (9th Cir.), cert. denied, 384 U.S. 1002 (1966).

Nevertheless, as the court below acknowledged (Pet. App. 14a), its decision conflicts with the decision of the Eighth Circuit in *Pet, supra*. The issue is a recurrent one. It is, therefore, important that the existing uncertainty as to the scope of the right of employees and their union representatives to conduct publicity campaigns directed to customers of neutral employers be eliminated, and that the conflict between the courts of appeals be resolved, as quickly as possible.

Accordingly, the Board does not oppose granting the present petition.

Respectfully submitted.

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Supplemental Brief

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THE EDWARD J. DEBARTOLO CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
FLORIDA GULF COAST BUILDING TRADES COUNCIL,
AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This memorandum is filed in response to the Court's request that the parties address the question of mootness mentioned (Pet. App. 4a n.2) by the court of appeals. We submit that the court below correctly concluded that completion of the construction that prompted the challenged boycott does not render this case moot.

1. In *Local 74, United Brotherhood of Carpenters* v. *NLRB*, 341 U.S. 707, 715 (1951), this Court rejected the contention that "completion of the renovation project" had rendered the case moot, with this explanation:

> The complaint was against [the union's] use of secondary pressure upon Watson's in a manner proscribed by the statute. The use of such pressure on this renovation

> project was merely a sample of what might be repeated elsewhere if not prohibited. The underlying dispute between [the union] and Watson's has not been shown to have been resolved.

Accord: *NLRB* v. *Denver Building & Construction Trades Council*, 192 F. 2d 577, 579 (10th Cir. 1951); *NLRB* v. *Plumbers Union, Local 457*, 299 F. 2d 497, 501 (2d Cir. 1962). See also *Division 1287, Motor Coach Employees* v. *Missouri*, 374 U.S. 74, 77-78 (1963) (no mootness where labor dispute that led to seizure of business "remains unresolved," though seizure had terminated). The reasoning of *Local 74* v. *NLRB, supra*, is controlling in this case.

The challenged boycott was prompted by H.J. High Construction Company's work at one of petitioner's shopping malls. Construction of the particular department store has been completed. As in *Local 74*, however, the underlying labor dispute between High and the union has not been resolved. High operates widely throughout Florida (C.A. App. 21).[1] The boycott here (341 U.S. at 715) "was merely a sample of what might be repeated elsewhere if not prohibited." Indeed, High may again be engaged to build other additions to the shopping mall involved in this case or additions to one of petitioner's other malls.

2. Even if construction of the particular project involved here is viewed in isolation, this case presents issues that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); see *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125 (1974). As this Court's recent decisions have made clear, a case is not moot if: (1) the challenged conduct was too short in duration to permit full litigation of its legality prior

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[1] "C.A. App." refers to the appendix filed in the court of appeals.

to its cessation; and (2) there is a reasonable expectation that the complaining party will be subject to the same action again. *E.g., Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979); *SEC* v. *Sloan*, 436 U.S. 103, 109-110 (1978); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). As to the first requirement, High completed its work at the shopping mall and thus eliminated the reason for the boycott even before the Fourth Circuit's decision. A labor dispute involving a building project is, in the usual case, likely to be of relatively short duration. The project will be completed or the dispute resolved long before proceedings before the Board and the judiciary adjudicating the alleged unfair labor practices can be completed.[2] The second prerequisite for application of the *Southern Pacific* doctrine is also satisfied. There are 85 tenant stores in just the shopping mall involved in this case; each of those tenants deals with other employers who may become involved in labor disputes. Any of those labor disputes may result in a consumer boycott of petitioner and its tenants. Since petitioner operates a number of other shopping malls in Florida (C.A. App. 19) and elsewhere, any of which could be the target of a boycott arising from the labor disputes of any of the employers with which its tenants must deal, there is at least a "reasonable expectation" that petitioner will again be subject to such conduct. See *Gannett Co.* v. *DePasquale, supra*, 443 U.S. at 377-378; *SEC* v. *Sloan, supra*, 436 U.S. at 109-110 & n.5.[3]

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[2]The unfair labor practice charges here were filed in December 1979; the Board's decision and order was issued on September 30, 1980; and the decision of the court of appeals was issued on October 20, 1981 (Pet. App. 1a, 19a). This almost two-year period between the filing of the charge and the completion of court of appeals proceedings to review the Board's order is typical in unfair labor practice cases.

[3]The preclusive effect of the judgment in this case in any subsequent suit for damages under Section 303 of the Labor-Management Relations Act, 1947 (29 U.S.C. 187) provides another basis for concluding

It is therefore respectfully submitted that this case is not moot.

REX E. LEE
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JULY 1982

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that this case is not moot. See *Edgar* v. *Mite Corp.*, No. 80-1188 (June 23, 1982), slip op. 5; cf. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 305-306 (1964) (*potential* liability on injunction bond sufficient to avoid mootness though construction project completed).

Opposition

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MEMORANDUM FOR THE FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO

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MEMORANDUM FOR THE FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO

The National Labor Relations Board has filed a memorandum in the instant case that concludes "the Board does not oppose granting the present petition."

In light of the Board's position and so as not to burden the Court with an unnecessary duplicative filing, the respondent Florida Gulf Coast Building Trades Council,

AFL-CIO, hereby notes that, like the Board, the Building Trades Council believes the decision below is compelled by this Court's reading in *NLRB* v. *Servette, Inc.*, 377 U.S. 46, of § 8(b)(4) of the National Labor Relations Act, as amended, may, however, as the court below acknowledged, fairly be said to be in conflict with the erroneous decision in *Pet, Inc.* v. *NLRB*, 641 F.2d 545 (C.A. 8) and that the resulting conflict in the circuits is one warranting resolution by this Court.

On this basis, the respondent Building Trades Council does not oppose granting the petition in the instant case.

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SUPPLEMENTAL MEMORANDUM FOR THE FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO

This supplemental memorandum by respondent Florida Gulf Coast Building Trades Council, AFL-CIO, responds to the Court's request of June 28, 1982, that the parties to this case file such memoranda addressing the question of mootness noted in the court of appeals' opinion (Pet. App. 4a n. 2).

For the reasons stated by the National Labor Relations Board in its supplemental memorandum, the respondent Building Trades Council agrees with the NLRB

that this Court's governing decisions, most particularly *Carpenters Union* v. *Labor Board*, 341 U.S. 707, 715, establish that this case is not moot. We note only one additional point: if the question were an open one, we would argue that the mootness rule should apply. The underlying controversy here is at most a shadow of its former self. There is, so far as we are aware, no construction going on at petitioner DeBartolo's shopping mall, there is no indication that DeBartolo is even contemplating doing any construction work within respondent Building Trades Council's jurisdiction, and there is no indication that DeBartolo would, if it were to engage in such construction, use H. J. High Construction Co. (the contractor involved here) or any other contractor paying sub-standard wages. In these circumstances, DeBartolo seeks to invoke this Court's jurisdiction to vindicate a most abstract claim.

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Amicus Brief

1

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF

and

BRIEF OF AMICUS CURIAE, AMERICAN RETAIL FEDERATION, SUPPORTING PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

The American Retail Federation ("Federation") respectfully moves the Court for leave to file a brief amicus curiae supporting the petition by the Edward J. DeBartolo Corporation for a writ of certiorari.

The Federation is made up of thirty-three national associations and fifty state associations of retailers, repre-

senting through these associations one million five hundred thousand retailers. These retailers range from large, multi-unit enterprises to corner markets and small variety stores and employ approximately fourteen million people. Thus, the Federation is in a unique position to express the interests of this very important segment of the national economy.

The Federation regularly represents the interests of its member-employers in important labor relations matters. It concerns itself with national issues and problems affecting retailers and has sought to advance the interests of its member-employers by participating in a wide range of labor relations litigation before this Court and other courts and in testimony before Congress involving labor legislation.

The specific issue presented in this case is whether, despite the producer-distributor requirement of the publicity proviso of Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4), a union may handbill urging a consumer boycott of all the neutral tenants of a shopping center and the neutral owner of the center simply because the union has a labor dispute with the contractor of one of the tenants.

Many of the Federation's member-employers are shopping center tenants. By and large they are independent, autonomous enterprises. The decision of the Court of Appeals in this case permits coercive secondary activity against neutral retailers simply because another tenant may be involved with a contractor who may have a labor dispute. As a result, these neutral retailers will be enmeshed in labor disputes over which they have absolutely no control or influence. Furthermore, the decision of the court below will no doubt be read to permit secondary ac-

tivity against innocent, uninvolved retailers in other contexts. The impact of the decision will be felt by countless retailers and thus this case warrants the participation of the Federation on behalf of its national members.

The Federation has secured the written consent of each other party to this proceeding to its filing of a brief amicus curiae in support of the petition for certiorari filed by the Edward J. DeBartolo Corporation.

For all these reasons, it is respectfully requested that the Federation be given leave to file the following brief as amicus curiae.

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BRIEF OF AMICUS CURIAE, AMERICAN RETAIL FEDERATION, SUPPORTING PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is stated in the Motion preceding this brief and incorporated herein.

ARGUMENT

I. The Decision Of The Court Of Appeals For The Fourth Circuit Is In Direct Conflict With A Decision Of The Court Of Appeals For The Eighth Circuit.

In this case, a divided panel of the Court of Appeals for the Fourth Circuit denied the Edward J. DeBartolo Corporation's petition to set aside an order of a divided panel of the National Labor Relations Board ("Board") (A.[1] 1-18). The Board, one member dissenting, had dismissed a complaint alleging that handbilling urging a total consumer boycott of a shopping center and all stores within it was an unfair labor practice (A. 19-30). The handbilling grew out of a dispute between a labor organization and the contractor engaged by a department store to build a store that would connect with and become a part of a mall owned by DeBartolo (A. 2). Both the Board and the court held that the publicity proviso to Section 8(b)(4) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b)(4), protected the handbilling. The proviso protects truthful publicity that advises the public "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." The Fourth Circuit determined that the producer-distributor requirement of the proviso had been met under the following rationale: The contractor (with whom the labor organization had a primary dispute) was a "producer" of the department store

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1. The text of the Fourth Circuit's decision, *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), and the text of the underlying Board decision, *Florida Gulf Coast Building Trades Council, AFL-CIO*, 252 NLRB 702 (1980), are reprinted in full in the Appendix to Petition for Writ of Certiorari and are cited herein as "A."

and of the mall enterprise itself; DeBartolo and all of the mall's other tenants were distributors of both these "products" (A. 7-8). The Board had found the relationship between DeBartolo and all tenants "symbiotic in nature" and, from the standard language of the tenants' leases, found interdependence and a mutually beneficial relationship. The Fourth Circuit approved (A. 7). The majority of the court and the Board gave the producer-distributor requirement a more than generous interpretation that protects secondary activity even when there is "no direct connection between the primary employer and the handbilled employer" (A. 12). As the dissenting judge noted, this interpretation is "totally at odds with any normal interpretation of the word 'produce' " (A. 18).

In sharp contrast, the Eighth Circuit in *Pet, Inc. v. NLRB*,[2] reversed a decision of the Board that a union's boycott activities against the products of the parent company (Pet) of an employer (Hussmann) with whom the union had a dispute were protected by the publicity proviso. The majority of the Eighth Circuit panel refused to approve the Board's unreasonable interpretation of the word "produce." The court could not say, as the Board had, that "because Hussmann's profits inure to the benefit of Pet, Hussmann produces Pet's products." The connection between Pet's products and Hussmann was "too highly attenuated" for the court to permit the use of the publicity proviso.[3] As in *DeBartolo*, one judge dissented.[4]

The Fourth Circuit majority recognized that it was rejecting the reasoning of the majority in *Pet* in favor of that of the dissent (A. 14); and, the reasoning of the

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2. 641 F.2d 545 (8th Cir. 1981).
3. 641 F.2d at 549.
4. 641 F.2d at 550-553.

majority in *Pet* found favor with the dissenting judge in *DeBartolo* (A. 18).

Rarely does a conflict between circuits appear as clear as in these differing interpretations of the publicity proviso of Section 8(b)(4) of the Act. Because secondary consumer boycotts have now "replaced" or "substantially supplemented" the primary strike,[5] it is highly likely that the question presented by the petition in this case will be posed again and again to the Board and other circuits. The Board will be faced with administering, in effect, two different Federal laws—the law of the Fourth Circuit and the law of the Eighth Circuit. Other circuits will have to choose between clearly conflicting precedents. Thus, resolution by this Court at this time is highly desirable.

II. The Decisions Of The Court Of Appeals And Of The Board In This Case And Other Cases Reveal A Lack Of Understanding Of The Reasoning And Holding Of The Supreme Court In NLRB v. Servette, Inc.[6]

In *Servette*, this Court held that the proviso of Section 8(b)(4) of the Act protected secondary handbilling because products "produced by an employer" included products distributed by a wholesaler with whom a primary dispute existed.[7] The Court carefully grounded its holding in an analogy to the use of the term "produced" in other labor laws, and used the Fair Labor Standards Act, 29 U.S.C.

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5. *See*, Zimmerman, *The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), The Board and The Courts* (Remarks Before the 1981 New York University National Conference on Labor), reprinted at 117 Daily Lab. Rep. D-1 (June 18, 1981).

6. 377 U.S. 46 (1964).

7. 377 U.S. at 55.

§203(j), and cases construing it as support for its interpretation of the term.[8]

Unfortunately, subsequent Board and lower court decisions have either ignored the produced-distributed language of the proviso or arbitrarily and inappropriately assigned the statute's terms—"products," "produced," "distributed"—to activities in complete disregard of normal English usage. For example, in *Local Union No. 54, Sheet Metal Workers (Sakowitz)*,[9] the Board stated its understanding of the publicity proviso as follows:

> The proviso to Section 8(b)(4) authorizes publicity other than picketing which persuades customers of a secondary employer to stop trading with him except to the extent that such publicity has the effect of cutting off his deliveries or inducing his employees to cease work.[10]

Thus, the Board simply disregarded the limiting language of the proviso, the very language which this Court took pains to interpret logically and reasonably in *Servette*.

The Fourth Circuit in this case did not ignore the statute's limiting language but rather approved the Board's distorted interpretation of the language. To say that a contractor engaged to build one store in a shopping center is a "producer" of the "entire mall enterprise itself" is mere sophistry. Such reasoning deprives the limiting language of the proviso of any meaning at all.

It is not the place of the Board to edit out of statutes limiting language it finds troublesome; and, it is not the

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8. 377 U.S. at 56.

9. 174 NLRB 362 (1969).

10. 174 NLRB at 363.

place of a court to expand the normal application of the words of a statute thereby rendering the words meaningless. That is, however, what has been happening, possibly as a result of a misunderstanding of the following passage in *Servette*:

> There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception and we see no basis for attributing such an incongruous purpose to Congress.[11]

In *Servette* the passage was followed by a careful examination of the meaning of "produced" and explanation of why it could be applied to the wholesale distribution of goods. Later courts have cited the passage[12] but have then mechanically applied the term to any relationship, however attenuated, between a primary and secondary employer, sometimes with results that the courts themselves have recognized as incongruous.[13]

It has been almost twenty years since this Court spoke to the publicity provisio in *Servette*. In that time the Board and the lower courts have strayed from the path broken by *Servette*. The time is right for a decision which will clarify the publicity proviso for the Board and lower Federal courts.

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11. 377 U.S. at 55.

12. *See, e.g., Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434, 436 (9th Cir. 1966), *cert. denied*, 384 U.S. 1002 (1966); and *DeBartolo* (A. 8).

13. *Great Western Broadcasting Corp.*, 356 F.2d at 436.

III. The Decision Of The Court Of Appeals For The Fourth Circuit Sets No Standard By Which Activity Alleged To Be Within The Publicity Proviso Can Be Measured.

The decision in this case that the contractor engaged to build one store in a shopping center is a "producer" of all the activities of all the stores in the mall is based on a recitation of the terms of the stores' leases which were found to reflect the "symbiotic nature" of the relationship between the mall owner and all mall tenants (A. 7). This recitation of facts, which are characterized as indicia of "symbiosis," leaves the Board and other courts with no standard whereby they can determine whether there is the requisite producer-distributor relationship. Questions abound: Which of the lease terms recited were critical to the decision of the Board and the Circuit? If there had been no increase in rent for other tenants upon completion of the store which the contractor was engaged to build, would there still have been the same "symbiotic" relationship? Was the fact that the primary dispute related to construction of a *large* department store important? Would the result have been the same if the primary dispute had been between a contractor remodeling a tiny specialty shop and his employees? If all the lessees of space in an industrial park contributed to maintenance of common streets, would they be in a symbiotic relationship with a new lessee whose builder was involved in a labor dispute? Would downtown stores who all belonged to an area improvement association be in a symbiotic relationship? Would each tenant of an office building be a "producer" of the "products" "distributed" by all the other tenants? What facts would be relevant to make such a determination?

With only conflicting appellate decisions and without any discernible standard to guide them, the Board and the courts can only flounder.[14] Retailers, for whom secondary activity can be devastating, are left in a state of uncertainty. This confusion warrants resolution by this Court.

SUMMARY OF ARGUMENT

Amicus Curiae urges this Court to grant the petition for a writ of certiorari for the following reasons: There is an irreconcilable division among the Courts of Appeals with respect to the meaning and application of the publicity proviso to Section 8(b)(4) of the National Labor Relations Act; the division goes not simply to the application of an agreed upon standard by which activities may be measured, but rather to the fundamental question of what the standard must be; the National Labor Relations Board and the Fourth Circuit have either ignored or distorted the meaning of *Servette*, the key Supreme Court publicity proviso case now almost twenty years old; and, the result of this conflict and confusion over the standard to be applied in publicity proviso cases will be a significant disruption in the administration of the National Labor Relations Act.

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14. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

CONCLUSION

For each of the reasons set forth above, Amicus Curiae urges that, in the interest of providing a proper analysis of Section 8(b)(4) of the National Labor Relations Act and resolving the conflict among the United States Courts of Appeals and the National Labor Relations Board, the Petition for a Writ of Certiorari be granted herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, (AFL-CIO),
Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of over 3,700 state and local chambers of commerce and trade and

[1] Pursuant to Supreme Court Rule 36(1), the written consents of all parties are being filed concurrently herewith.

professional associations and a direct business membership in excess of 200,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance these interests in a wide spectrum of labor relations litigation before this and other courts.

The issue presented in the instant case is a matter of substantial importance to the Chamber. That question is whether, notwithstanding the "producer-distributor" restriction expressly contained in the publicity proviso to Section 8(b)(4) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4),[2] a union may nevertheless engage in a consumer boycott against a neutral secondary employer who has only an asserted "symbiotic" relationship with the primary employer with whom the union has its dispute.

The answer to this question will necessarily exert a significant impact on the rights of many Chamber members and their

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[2] The proviso provides:

"*Provided further*. That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, *that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer*, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distributions. (The underscored portions are those critical to a resolution of this case).

manner of doing business.[3] Heretofore, unrelated business entities, even where they are associated for mutual benefit, have been protected from the coercive secondary activity which Section 8(b)(4) of the Act was designed to prevent. The new interpretation of the publicity proviso sanctioned by the decision below would now remove that protection. A labor organization would be permitted to enmesh all tenants of a shopping center in its dispute with any one tenant or, as here, even a dispute with a party who is simply doing business with a single tenant. In addition, the decision below will effect a variety of other types of business relationships which, like the shopping center owner and tenants involved here, also have a "mutually beneficial" relationship. These far-reaching consequences will be exacerbated by the likely acceleration of union handbilling activities such as that at issue in this case. For these reasons, the Chamber respectfully requests the Court to consider its views.

REASONS FOR GRANTING THE WRIT

1. The majority below freely acknowledged that it gave the producer-distributor requirement of the publicity proviso a "generous interpretation" by protecting handbilling "even when there is no direct connection between the employer and the handbilled employer." *Edward J. DeBartolo Corp.* v. *N.L.R.B.*, 662 F. 2d 264, 270-71 (4th Cir. 1981). The majority also recognized that it "differ[ed] with the reasoning and conclusions of the Eighth Circuit majority in *Pet*" where the publicity proviso had been "construed . . . in a rather different fashion." 662 F. 2d at 272. Conversely, the dissent below

[3] The importance of the instant case is further demonstrated by the fact that the Chamber, the American Retail Federation, and the Building and Construction Trades Department, AFL-CIO, all submitted briefs *amicus curiae* to the court below. The Chamber also submitted a brief *amicus curiae* in a similar case before the Eighth Circuit, *Pet, Incorporated* v. *N.L.R.B.*, 641 F. 2d 545 (8th Cir. 1981).

properly endorsed *Pet* and concluded that the majority opinion's definition of the producer-distributor requirement "require[d] a strained construction of the statute," is "totally at odds with any normal interpretation of the word 'produce'" and would protect handbilling even where there was only a "highly attenuated relationship." 662 F. 2d at 274.

Logic and common sense dictate that the decision of the majority below would, for all practical purposes, eliminate the producer-distributor limitation carefully legislated by Congress. There is no dispute that DeBartolo, Wilson's, and the other East Lake Square Mall tenants in this case are all parties to a standard lease which imposes a "mutually beneficial relationship between, and interdependence of, DeBartolo and the mall's tenants." 662 F. 2d at 268. But, High, the primary employer in this case, does not share this nexus. As a general contractor hired exclusively by Wilson's to build the Wilson's store exclusively for Wilson's, High "is not a tenant of DeBartolo, does not operate department stores, and has no contract or business relationship with DeBartolo or any tenant other than Wilson's." *Florida Gulf Coast Building Trades Council, AFL-CIO and the Edward J. DeBartolo Corporation*, 252 NLRB 702, 703 (1980). Nevertheless, the lower court concluded "that not only the High-Wilson's relationship but also the High-DeBartolo relationship and the relationship between High and the mall's tenants could be described as that of producer and distributor." 662 F. 2d at 269.

The ramifications of the decision below are staggering. If High is related to the shopping center enterprise as a "producer", then any other employer who conducts business with any one of the tenants is likewise related to the shopping center enterprise as a "producer." As a result, if one of the multitude of companies that a large department store does business with becomes involved in a labor dispute, all of the other establishments located in the same shopping center may also then become embroiled in that controversy. If, for example, a

supplier to the department store, whether it be a supplier of major merchandise or minor services, happens to pay its employees substandard wages, any other facility located in that same center may be subjected to a crippling consumer boycott notwithstanding that it does business with neither the department store nor the supplier. Indeed, it does not even matter that, as in this case, some of the boycotted employers may be actual competitors of the department store or have no practical control or influence over either the department store or the supplier's labor policies.' The union is left free, moreover, to randomly choose which stores it may seek to boycott: it may limit its activities to the offending supplier or department store, extend them to the shopping center owner, involve other center tenants and even conceivably appeal to consumers to boycott the owners or tenants of other shopping centers where the department store is also located. In each of these instances there exists an alleged "symbiotic" relationship which removes the secondary boycott protection of the "producer-distributor" limitation to the publicity proviso.

The reach of the decision below can be directly "applied to any number and variety of merchandising and service operations . . . because there is no legally acceptable definition of the phrase 'shopping center.' "[4] Many large department stores,

[4] *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P. 2d 803 (Wash. Super. Ct. 1959). Shopping centers range, for example, from small strip centers such as the center involved in *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 931 (1970), *viz.*, a single retail store containing a supermarket and a small drug department, all owned and operated by the same company, with adjacent parking spaces for two rows of automobiles, to very large super-regional centers such as the center involved in *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), which embraced approximately 50 acres, accommodated more than 1,000 automobiles and had a perimeter of almost one and one-half miles. The most recent shopping center phenomena, commencing in the mid-1950's, is the enclosed shopping mall. These malls have evolved from 'tenative ventures by major urban depart-

(Footnote continued on following page)

with leased departments or concessions, are also characterized by the "symbiotic" relationships of a shopping center. So are the common occupants of a large office building (cf. *Seattle First National Bank* v. *N.L.R.B.*, 638 F. 2d 1221 (9th Cir. 1980)) or the common tenants of an industrial park (cf. *Eisenberg* v. *Holland Rantos Co.*, 583 F. 2d 100 (3rd Cir. 1978)). An infinite variety of other business relationships can similarly be equated to the "mutually beneficial" relationship present here. In *Pet*, for example, the Board applied its new publicity proviso test to the divisions of a corporate conglomerate even where there was no common control, joint work products, or direct business dealings between the divisions of that enterprise. Indeed, as the petition for certiorari in this case points out (pp. 10-11), the hodgepodge grouping of business establishments along most commercial streets enjoy a mutually beneficial relationship: each business attracts consumers who may frequent the other stores along the street; they may all belong to a merchant association which engages in a variety of promotional and advertising activities intended to increase business; they may all join together to provide for security, sanitation, and other common services; and they may all belong to local chambers of commerce because of a wide variety of shared interests. If the new proviso test is carried to its logical extreme, whenever a union is engaged in a labor dispute, any business entity which provides benefits to or is benefited from the primary employer can be subjected to handbilling activities. The "mutually beneficial" relationship test sanctioned by the majority below would thus render the producer-distributor limitation a nullity.

(Footnote continued from preceding page)

ment stores risking the invention of a subsidiary outlet" to a "veritable gothic spire of malls: the Center Companies' Quail Springs Mall in Oklahoma City, which not only has three levels above ground, but an entire galleria below." *Mall Talk—The Selling of the Presents, 1980*, TWA Ambassador (Dec. 1980), pp. 21-22.

2. Congress recognized that union secondary boycott activity can be a devastating weapon; it destroys the free flow of commerce and places a neutral employer in jeopardy of losing all or part of his established business.[5] In expressly limiting the scope of the publicity proviso to cases where there is a "producer-distributor" relationship, Congress intended to insulate neutral, unoffending employers from controversies not their own while concurrently permitting labor organizations to engage in legitimate publicity of a labor dispute.

The decision below does not achieve either of these dual Congressional objectives. A union that engages in publicity proviso activity for the purpose of informing consumers about a labor dispute presumably has a viable objective. By asking that consumers boycott a secondary concern which distributes a product produced by the primary employer, the union seeks to pressure the primary into a favorable settlement in two ways: *first*, a successful boycott of the secondary-distributor would diminish sales of the primary-producer's product; *second*, since the secondary is directly injured by the loss of business arising out of the boycott, he may stop or threaten to stop the distribution of the primary's product unless the primary settles its labor dispute. Here, however, the handbilling directed at DeBartolo and the other tenants can accomplish neither objective. These neutrals would plainly be injured by the union's boycott activities but, because they are not "distributors" of any product produced by High, nor even any product produced by Wilson's, a boycott of their business would damage neither High nor the Wilson's store undergoing construction. Since the injured tenants would also not be able to threaten to terminate any distribution of the primary's products, they could exert no leverage to resolve the underlying labor dispute. In urging a boycott of DeBartolo and the tenants, therefore, the Union here seeks to injure neutral employees who have no control over the

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[5] See, e.g., II Legislative History of the Labor-Management Reporting Act of 1959, pp. 989, 1376, 1425, 1446, 1842 (1959).

primary employer and who cannot contribute to a resolution of the underlying controversy and the restoration of tranquil labor relations.

3. Review by this Court is additionally necessary because the scope of lawful proviso activity presents a recurrent issue of substantial importance. The national and even international boycotts undertaken by unions against such companies as J.P. Stevens, Gallo, and Farah illustrate the dimensions and frequency and efficacy of the "union's ultimate weapon."[6] The United Steelworkers, in a continuing labor dispute with Proctor & Gamble Company, recently launched an international boycott of 10 P&G soap products, the first worldwide boycott of consumer soap products.[7] To publicize an ensuing labor dispute with Texaco, Inc., the "tactics used successfully against textile maker J.P. Stevens," will "likely" be utilized in the near future by the Oil, Chemical and Atomic Workers Union against chewing gum manufacturer William Wrigley, a director of Texaco, because, according to that union, "people like Wrigley who are involved with Texaco must be drawn into the conflict."[8]

This recent burgeoning of union secondary boycott activity is a natural product of the contemporary state of our economy. Employers are now able to maintain operations in the face of strikes by turning to the pool of unemployed and underemployed individuals in the community as striker replacements. At the same time, striking employees, who rely on a steady pay check, cannot afford to engage in prolonged walkouts. Recognizing, however, that "no company can continue to operate for

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[6] Zimmerman. *The Changing Arsenal of Economic Weapons; Consequences for Section 8(b)(4), The Board And The Courts,* (remarks before the 1981 New York University National Conference on Labor), reprinted at 117 Daily Lab. Rep. D-1 (June 18, 1981).

[7] *Steelworkers Launch International Boycott of P & G Soap Products,* 88 Daily Labor Rep. A-11 (May 6, 1982).

[8] "Union's Fight May Stick Wrigley," Chicago Sun Times, April 27, 1982, at 16, col. 1.

very long without customers,"[9] labor organizations now have resorted to consumer boycotts, handbilling of other companies that do business with the primary employer, and the employment of experts to use "nettlesome means to underline ties of outside firms and people to the targeted company."[10]

This Court has historically recognized the need to determine the coverage of the secondary boycott prohibitions of the National Labor Relations Act.[11] By considering the question here presented, the Court's time will similarly not be misspent. The diametrically opposed views of the Eighth and Fourth Circuits now leaves the publicity proviso area of the law in substantial disarray. Without guidance from this Court, unions will continue to enmesh neutral employers in their labor disputes in disregard of the producer-distributor limitation contained in the publicity proviso. Neutral employers subjected to consumer boycotts will continue to challenge such activities before the Board and courts on the ground that the union's conduct exceeds the scope of the proviso's limitations. The present case provides the Court with an appropriate vehicle—which may not soon occur again if the Board's General Counsel hereafter declines to issue complaints in this area—to resolve this significant controversy. The Court should grant the petition and thereby preclude this significant dislocation in the administration of the national labor law.

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[9] Zimmerman, *supra*, n. 6, at D-1.

[10] "Union's Fight May Stick Wrigley," *supra*, n. 8.

[11] See e.g., *International Longshoremen's Assn.* v. *Allied International*, ____ U. S. ____, No. 80-163, 76 Daily Lab. Rep. D-1 (April 20, 1982); *N.L.R.B.* v. *Retail Store Employees*, 447 U. S. 607 (1980); *N.L.R.B.* v. *Servette, Inc.*, 377 U. S. 46 (1964); *N.L.R.B.* v. *Fruit Packers*, 377 U. S. 58 (1964); *Electrical Workers Local 761* v. *N.L.R.B.*, 366 U. S. 667 (1961); *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U. S. 675 (1951).

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED[1]

The publicity proviso exception to the secondary boycott prohibitions of the National Labor Relations Act (the "Act"), 29 U. S. C. § 158(b)(4)(i)(ii)(B), permits a union to publicize a labor dispute in certain circumstances provided that the publicity relates to a "product" or "products" which have been "produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." The questions presented are:

1. Whether, notwithstanding the producer-distributor limitation of the proviso, a union may handbill coercing consumers to boycott a neutral shopping center and its neutral tenants because that union has a labor dispute with a contractor who is constructing a building for one of the tenants.

2. Whether regulation of coercive union handbilling that violates the secondary boycott prohibitions of the Act contravenes the First Amendment.

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[1] A listing of Petitioner's subsidiaries is included in the petition for writ of certiorari.

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Giboney v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949) 33

Goldfinger v. *Feintuch*, 276 N. Y. 281, 11 N. E. 2d 910 (1937) 13

Hughes v. Superior Court, 339 U.S. 460 (1950) 29, 32, 33

I.B.E.W., Local 501 v. N.L.R.B., 181 F.2d 34 (2nd Cir. 1950), *aff'd*, 341 U.S. 694 (1951) 29, 31

International Brotherhood of Teamsters, Local No. 537 (Lohman Sales Co.), 132 NLRB 901 (1961) 10, 18

International Die Sinkers Conference (General Metals Corp.), 120 NLRB 1227 (1958) 9

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Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) . 19

Kroger Company v. N.L.R.B., 477 F.2d 1104 (6th Cir. 1973) 11

Local No. 742, United Brotherhood of Carpenters (J. L. Simmons Co., Inc.), 201 NLRB 70 (1973) 25

Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.), 133 NLRB 1698 (1961) 10, 18

Local Union No. 54, Sheet Metal Workers Int'l Ass'n (Sakowitz, Inc.), 174 NLRB 362 (1969)... 20

Local Union No. 438, Plumbing and Pipe Fitters (George Koch Sons, Inc.), 201 NLRB 59 (1973), *enf'd.*, 490 F.2d 323 (4th Cir. 1973) 25

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Lumber and Sawmill Workers Local Union No. 2797 (Stoltze Land and Lumber Co.), 156 NLRB 388 (1965) 11

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 28

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 30, 32

Miami Newspaper Pressmen's Local No. 46 v. N.L.R.B., 322 F.2d 405 (D.C. Cir. 1963) 12

Mitchell v. Five Boro Construction Corp., 14 Wage and Hour Cas. (BNA) 720 (D.P.R. 1960) 17

N. A. A. C. P. v. *Claiborne Hardware Co.*, ____ U. S. ____, 73 L. Ed. 2d 1215 (1982) 29, 30

Nashville Building and Construction Trades Council (Castner-Knott Dry Goods Store), 188 NLRB 470 (1971) 11, 20

National Woodwork Manufacturers Ass'n v. *N.L.R.B.*, 386 U. S. 612 (1967) 25

N.L.R.B. v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979) 28

N. L. R. B. v. *Denver Building and Construction Trades Council*, 341 U. S. 675 (1951) 12

N. L. R. B. v. *Fruit and Vegetable Packers and Warehousemen, Local No. 760 ("Tree Fruits")*, 377 U. S. 58 (1964) ..... *passim*

N. L. R. B. v. *Gissel Packing Co.*, 395 U. S. 575 (1969) 30

N. L. R. B. v. *International Longshoremen's Ass'n*, 447 U. S. 490 (1980) 25

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N. L. R. B. v. *Local Union No. 3, Int'l Brotherhood of Electrical Workers*, 477 F. 2d 260 (2nd Cir. 1973), *cert. denied*, 414 U. S. 1065 (1973) 29

N. L. R. B. v. *Retail Store Employees Union, Local 1001 ("Safeco")*, 447 U. S. 607 (1980) 30, 31

N. L. R. B. v. *Servette, Inc.*, 377 U. S. 46 (1964) .... *passim*

N. L. R. B. v. *Virginia Electric & Power Co.*, 314 U. S. 469 (1941) 29, 33

Pell v. *Procunier*, 417 U. S. 817 (1974) 32

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Scholl v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2nd Cir. 1948) 17

Scott Hudgens, 230 NLRB 414 (1977) 26

Service and Maintenance Employees Union, Local 399 (Burns International Detective Agency), 136 NLRB 431 (1962) 11

Service Employees, Local 399 (Delta Air Lines), 263 NLRB No. 153, 111 LRRM 1159 (1982) 10, 12

Truck Drivers and Helpers Local Union No. 728 v. *Empire State Express, Inc.*, 293 F. 2d 414 (5th Cir.), *cert. denied*, 368 U. S. 931 (1961) 9

United States v. *O'Brien*, 391 U. S. 367 (1968) 30, 33

United States v. *Montgomery Ward & Co., Inc.*, 150 F. 2d 369 (7th Cir. 1945) 17

United Steelworkers of America v. *N. L. R. B.*, 376 U. S. 492 (1964) 9

United Steelworkers of America (Pet, Incorporated), 244 NLRB 96 (1979), *enf. denied*, 641 F. 2d 545 (8th Cir. 1981) ..... *passim*

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Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976) 30

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II Legislative History of the Labor Management Reporting and Disclosure Act of 1959..... *passim*

Mall Talk-The Selling of the Presents 1980, TWA Ambassador (December, 1980)..... 27

R. Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 Va. L. Rev. 195 (1960)..... 13

Zimmerman, *The Changing Arsenal of Economic Weapons; Consequences for Section 8(b)(4), The Board and The Courts*, 117 Daily Lab. Rep. (BNA) D-1 (June 18, 1981) 28

No. 81-1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and
FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 662 F. 2d 264. Pet. App., pp. 1a-18a.[2] The decision and order of the National Labor Relations Board is reported at 252 NLRB 702 (1980) *sub nom. Florida Gulf Coast Building Trades Council, AFL-CIO.* Pet. App., pp. 19a-30a.

[2] The opinions below are reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App."). Supplemental materials are reproduced in the separate Joint Appendix ("J. A.").

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit enforcing the decision of the Board was issued on October 20, 1981. Pet. App., pp. 31a-32a. A timely petition for rehearing was denied on January 26, 1982 (Pet. App., pp. 33a-34a), and a petition for writ of certiorari was filed within ninety days of that date on April 23, 1982. This Court granted that petition on October 12, 1982.[3] The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment of the Constitution of the United States, in pertinent part, provides: "Congress shall make no law . . . abridging the freedom of speech. . . ."

The relevant provision of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.*, provides:

> Sec. 158(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4)(i) to engage in, or induce or encourage any individual employed by any person . . . to engage in, a strike or refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> * * *

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[3] Supplemental briefs were first requested by the Court with respect to the issue of mootness. All the parties agreed that this case is not moot. For the reasons articulated in DeBartolo's supplemental memorandum to its petition for writ of certiorari, which it readopts, this case is not moot.

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . . .

* * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

STATEMENT OF THE CASE

The facts in this case are undisputed.[4] Petitioner, the Edward J. DeBartolo Corp. ("DeBartolo"), owns East Lake Square Mall, a shopping center located in Tampa, Florida. J. A., p. 20a. The center has approximately eighty-five (85) tenants who operate retail establishments. J. A., p. 22a. DeBartolo and each tenant executed a standard shopping center lease. J. A., pp. 22a-23a. Another tenant, H. J. Wilson Co., Inc. ("Wilson's"), signed a land lease agreement with DeBartolo in which Wilson's agreed to construct, own, and operate a department store as part of the center. J. A., p. 23a.

Wilson's retained High Construction Company ("High"), a general building contractor, to construct Wilson's store at the center. J. A., p. 23a. The Florida Gulf Coast Building Trades Council, AFL-CIO (the "Union"), had a labor dispute with High because it allegedly paid substandard wages and benefits. J. A., p. 24a. The Union did not have any dispute with either DeBartolo or any of its tenants. J. A., pp. 23a-24a. In late 1979 and early 1980 the Union handbilled at all the entrances to the center to protest High's alleged payment of "substandard wages and benefits." J. A., pp. 24a-25a. The handbill urged a total consumer boycott of the shopping center and all its tenants. J. A., pp. 84a-85a. The heading of the handbill stated: "PLEASE DON'T SHOP AT EASTLAKE SQUARE MALL PLEASE." J. A., 84a.[5]

The Union targeted DeBartolo and the tenants for this consumer boycott despite the absence of any direct nexus between High and either DeBartolo or, aside from Wilson's, the

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[4] The parties waived a hearing before an administrative law judge and submitted this case directly to the Board on a joint stipulation of facts. The entire factual record consists of that stipulation and the exhibits thereto. J. A., pp. 19a-88a.

[5] The handbill is reproduced in its entirety at pages 84a-85a of the joint appendix.

other tenants. J. A., pp. 23a-24a. Under the land lease agreement between Wilson's and DeBartolo, Wilson's was solely responsible for the construction of its store, including the selection of High as the building contractor. J. A., p. 23a. Neither DeBartolo nor any tenant, apart from Wilson's, participated in the selection of High. Nor did DeBartolo or any tenant, except for Wilson's, have any control over the manner in which High performed its work or paid wages to its employees. J. A., p. 23a. High did not perform work for either DeBartolo or, aside from Wilson's, any other tenant. Nor did High otherwise have any business relationship with those employers. J. A., p. 24a.[6]

After DeBartolo filed an unfair labor practice charge (J. A., pp. 3a-5a), the Board's General Counsel issued a complaint alleging that the Union's conduct constituted a secondary boycott prohibited by Section 8(b)(4) of the Act. J. A., pp. 6a-16a. However, the Board thereafter dismissed the complaint because, in its view, the Union's conduct fell within the publicity proviso exception to Section 8(b)(4). According to the Board, the producer-distributor limitation contained in the proviso was satisfied because High, DeBartolo, and all the tenants enjoyed "a mutually dependent and beneficial relationship" (Pet. App., p. 27a) which derived from their shared presence at the shopping center. The Board concluded

[6] Belk Lindsay of Tampa, Inc. ("Belk's") owns approximately 10.7 acres of property within the Eastlake Square Mall, consisting of a department store and the adjacent sidewalks and parking areas. J. A., p. 25a. Belk's is a business competitor of Wilson's. J. A., p. 26a. The only business relationship between Belk's and DeBartolo consists of Belk's payment of a fee for maintenance and security of the common area. J. A., p. 26a. Belk's does not have any type of a lease agreement with DeBartolo (J. A., p. 23a), and, accordingly, it is not a tenant of DeBartolo. Belk's connection to High's labor dispute is, therefore, even more attenuated than the connection of any of the tenants. Nevertheless, the decisions below did not distinguish between nor discuss the different situations presented by Belk's and the tenants. To avoid confusion, references to "the tenants" in this brief are intended to include Belk's as well.

that, for purposes of the producer-distributor requirement, High was "producing" for the benefit of DeBartolo and all its tenants by constructing a building for Wilson's. The shopping center, in the Board's opinion, "distributed" High's labor.

On appeal, a divided Court of Appeals agreed with the Board. While acknowledging that some "relational requirement" (Pet. App., p. 6a) arises from the producer-distributor limitation, the majority concluded that the shopping center's lease agreements, because they provided DeBartolo and its tenants with "a financial interest in High's work" (Pet. App., p. 12a), gave rise to a "symbiotic" (Pet. App., p. 7a) relationship which satisfied the producer-distributor requirement. In the Court's view, by "add[ing] value" to the Wilson's store, High became "a producer of the mall enterprise itself." Pet. App., p. 7a. Taking that "mall enterprise" theory one step further, the majority also concluded that DeBartolo and its tenants, "simply by conducting business . . . help[ed] 'distribute' the new Wilson's store and its inventory by attracting shoppers, helping to maintain common areas, and participating in joint advertising." Pet. App., p. 8a. Since, according to the Court, a "producer-distributor" relationship thereby existed between High, DeBartolo, and the tenants, the Union's boycott was exempted from the secondary boycott prohibitions of the Act by the publicity proviso exception. The dissent below disagreed; it concluded that the majority opinion "require[d] a strained construction of the statute." Pet. App., p. 18a. A subsequent petition for rehearing *en banc* was denied with four judges in favor of granting that petition.

SUMMARY OF ARGUMENT

1. The handbilling at issue in this case was not protected by the publicity proviso exception. That proviso permits unions to engage in a boycott of only those secondary employers who have a "unity of interest" with the primary employer. Absent

that nexus, coercion of a secondary employer is prohibited because: (1) the proviso's express language permits publicity, other than picketing, only to advise the public "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer"; (2) the proviso's legislative history demonstrates that permissible conduct does not encompass all publicity but is, instead, restricted to only those instances where the secondary employer is "distribut[ing]" the goods of the primary employer; (3) the term "produced," as used in other pre-existing labor laws, including the Fair Labor Standards Act, is confined to specified situations; and (4) Board and judicial precedent, until *United Steelworkers of America (Pet, Incorporated)*, 244 NLRB 96 (1979), *enf. denied*, 641 F. 2d 545 (8th Cir. 1981), and the instant case, also recognized that the producer-distributor restriction constituted words of special limitation which must be given effect.

In this case there is no "unity of interest" or similar nexus between the primary and secondary employers. The only labor dispute involves High, the general contractor allegedly paying substandard wages, and the Union. DeBartolo and the tenant stores had no real nexus, except by the most imaginative of theories, to either High or Wilson's. Wilson's leased its own land and operated its own store as a distinct corporate entity. No question of an ally or an integrated enterprise is involved. High's nexus to DeBartolo and the other tenants was even more attenuated. Only Wilson's had a business relationship with High, and only Wilson's had control over the selection of High and its method of doing business. Nevertheless, based solely on a shared interest in such matters as sanitation, security, and advertising, the decisions below concluded that there existed a "symbiotic" relationship which satisfied the proviso's producer-distributor requirement. This interpretation expands that limitation beyond all reasonable limits.

The Union's total consumer boycott of the shopping center thus improperly injured neutral, unrelated employers who had no control over or power to terminate the underlying controversy. If the decisions below are upheld, potentially every business entity in our economy, no matter how large or small, and regardless of its nexus to a primary labor dispute, will be subjected to the devastating effects of a secondary boycott.

2. By targeting DeBartolo and its tenants for a total consumer boycott, the Union's conduct exceeded the protective scope of the First Amendment. Congress has the constitutional authority to protect interstate commerce from the disruptive effects of secondary boycotts. Coercive economic activity, as this Court has held in numerous cases, whether it be by picketing or otherwise, may be regulated despite the incidental effect of that regulation on putative speech rights. Here, Congress sought to regulate such conduct in only narrowly drawn circumstances. Besides, ample alternative avenues for expression were available. The producer-distributor limitation of the publicity proviso thus strikes a permissible accommodation between the government's substantial interest in protecting neutral employers from the coercive effect of secondary boycotts and a union's interests under the First Amendment.

ARGUMENT

A. The Publicity Proviso Must Be Restricted To Those Situations Encompassed By A Producer-Distributor Relationship

Section 8(b)(4)(ii)(B) prohibits the coercion of "any person engaged in commerce or in an industry affecting commerce" where an object thereof is to force or require that person "to cease doing business with any other person." The Union violated this proscription when it advocated a consumer boycott of DeBartolo and the tenant stores. The Union's primary dispute was only with High. Apart from that dispute, it "would have had no cause to handbill at the East Lake Square Mall." J. A. 25a. DeBartolo and the tenants were thus neutral secondary employers within the meaning of the Act.[7] By seeking to coerce these neutrals to cease doing business with High, the Union engaged in an unlawful secondary boycott unless its actions were protected by the publicity proviso exception to Section 8(b)(4).[8]

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[7] There has been no contention that DeBartolo or the tenants were also primary employers: for example, that they constituted an "ally" of High's (see, *e.g.*, *Douds* v. *Metropolitan Federation of Architects, Local 231*, 75 F. Supp. 672 (S.D. N.Y. 1948); *International Die Sinkers Conference (General Metals Corp.)*, 120 NLRB 1227 (1958)), or a "co-employer" or "joint employer" of High (see, *e.g.*, *Building Service Employees Int'l Union Local 32-J* v. *N.L.R.B.*, 313 F. 2d 880 (D. C. Cir. 1963); *Truck Drivers and Helpers Local Union No. 728* v. *Empire State Express, Inc.*, 293 F. 2d 414 (5th Cir.), *cert. denied*, 368 U. S. 931 (1961)), or that the handbilling was permissible under either the "common-situs" or "roving situs" doctrines (see, *e.g.*, *United Steelworkers of America* v. *N.L.R.B.*, 376 U. S. 492 (1964)).

[8] Both the dissenting judge below and the Eighth Circuit in *Pet*, 641 F. 2d at 550, indicated that the Board had not determined whether, assuming the publicity proviso is inapplicable, the Union's conduct then constituted threats, restraint, or coercion in violation of Section 8(b)(4). Pet App., p. 18a. That conclusion is incorrect, and, should this Court find that the proviso does not protect the hand-

(Footnote continued on following page.)

The protection afforded by the publicity proviso is not absolute. There are four specified situations where the protec-

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(Footnote continued from preceding page.)

billing, no remand would be necessary. Analytically, of course, there was no need for either the Board or the Court of Appeals to have decided the question of the proviso's effect unless they had first concluded that the handbilling would otherwise violate Section 8(b)(4). Both the Union and the Board have conceded as much; at no stage of this proceeding have they ever argued either that the handbilling was not coercive or that it was for a lawful purpose. See, *e.g., Service Employees, Local 399 (Delta Air Lines)*, 263 NLRB No. 153, 111 LRRM 1159, 1161 (1982).

Indeed, the Board has repeatedly found that such conduct, absent the protection of the proviso, would constitute an impermissible secondary boycott. In *American Federation of Television and Radio Artists (Great Western Broadcasting Corp.)*, 134 NLRB 1617 (1961), *rev'd*, 310 F. 2d 591 (9th Cir. 1962), *supp. dec.* 150 NLRB 467 (1964), *aff'd*, 356 F. 2d 434 (9th Cir. 1966), the Board on remand considered the same question and concluded that, since the union was advocating a total boycott of the secondary employers rather than the single product boycott permitted by *N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local No. 760 ("Tree Fruits")*, 377 U. S. 58 (1964), "such conduct clearly constitutes threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii) of the Act." 150 NLRB at 471; see also the Ninth Circuit's subsequent opinion, 356 F. 2d at 435 ("In the further agency proceedings following the remand, the Board found that all of the questioned union conduct, other than the mere request that neutrals not advertise on KXTV, constituted threats, coercion, or restraint within the meaning of section 8(b)(4)(ii)(B)."); *Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705 (1961) ("[U]nless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on WOGA, would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that section."); and *International Brotherhood of Teamsters, Local No. 537 (Lohman Sales Co.)*, 132 NLRB 901, 904 (1961) ("While such conduct otherwise might constitute restraint and coercion . . . Respondent's handbilling in this case was protected by the proviso to Section 8(b)(4).").

tion of the proviso does not apply: (1) where the boycott is effectuated through either picketing or other conduct including handbilling which is "tantamount to picketing" (*Kroger Company* v. *N.L.R.B.*, 477 F. 2d 1104, 1108 (6th Cir. 1973));[9] (2) where the boycott results in refusals by employees, other than those of the primary employer, to pick-up, deliver or transport goods or to perform services; (3) where the publicity utilized is untruthful; and (4) where there is no producer-distributor relationship between the primary and secondary employers. Only the producer-distributor restriction is at issue before this Court.[10] As shown below, the interpretation of that requirement, which, as sought by the Respondents and sanctioned by the decisions below, would render it a nullity,[11] disregards the statutory language, contravenes the congressional intent, ignores prior precedent, and emasculates the proviso's deliberate

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[9] See also *Nashville Building and Construction Trades Council (Castner-Knott Dry Goods Store)*, 188 NLRB 470, 471 (1971) (simultaneous handbilling and picketing); *Lumber and Sawmill Workers Local Union No. 2797 (Stoltze Land and Lumber Co.)*, 156 NLRB 388, 394 (1965) (handbilling directed at customers and employees rather than the public); and *Service and Maintenance Employees Union, Local 399 (Burns International Detective Agency)*, 136 NLRB 431, 437 (1962) ("patrolling" handbillers held to be "coercive to a very substantial degree" and, as a result, engaged in conduct which Congress "did not intend to encompass . . . within the immunizing [publicity] proviso").

[10] While Petitioner argued below that the Union's handbilling was also untruthful and that the location of the handbillers was impermissible, these contentions have not been raised in this Court.

[11] See brief of the Board to the court below at p. 19 ("[T]he threshold question . . . is whether any means other than pure publicity was used; if not, the conduct is protected, regardless of whether the relationship between the primary and secondary employers involved would be covered by a literal reading of the proviso's 'producer-distributor' language"), and brief of the Union to the court below at pp. 11, 16. The Court of Appeals similarly concluded that "the Board's broad interpretation of the producer language of the proviso [is] in harmony with the congressional purpose of protecting *all* pure publicity by a union." Pet. App., p. 14a (emphasis added).

accommodation that immunizes secondary publicity in only certain circumstances.

1. Congress Intended That The Producer-Distributor Restriction Must Be Given Effect

The publicity proviso was enacted as part of the 1959 amendments to Section 8(b)(4). That section had been adopted in 1947 "to confine labor conflicts to the employer in whose labor relations the conflict had arisen" (*Miami Newspaper Pressmen's Local No. 46* v. *N.L.R.B.*, 322 F. 2d 405, 410 (D. C. Cir. 1963)) and to "shield . . . unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 692 (1951).[12] The amendments were intended to close the various loopholes that frustrated this Congressional desire to preclude the coercion of neutral employers.[13] The Landrum-Griffin bill which passed the House was broad enough to proscribe all picketing or other publicity which sought a secondary boycott. The Senate, on the other hand, proposed to exempt all forms of publicity. The result was a compromise: primary picketing is allowed; non-coercive publi-

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[12] See also *Service Employees, Local 399 (Delta Air Lines)*, 263 NLRB No. 153, 111 LRRM at 1161-2:

> Section 8(b)(4) was enacted primarily because Congress believed that neutral (secondary) employers should be protected from becoming involved in labor disputes not their own—and similarly that a union's ability to enmesh neutrals in other employers' labor disputes should be limited as much as possible.

See also *International Longshoremen's Ass'n.* v. *Allied International, Inc.*, ____ U. S. ____, 72 L. Ed. 2d 21, 30 (1982), where this Court similarly recognized that where the effect of "understandable and even commendable" union secondary boycott actions is "to impose a heavy burden on neutral employers . . . it is just such a burden, as well as the widening of industrial strife, that the secondary boycott provisions were designed to prevent."

[13] See, *e.g.*, *N.L.R.B.* v. *Servette, Inc.*, 377 U. S. 46, 51-54 (1964).

city which seeks to gain public support for a union involved in a labor dispute is allowed; and coercive truthful publicity, other than picketing, is also allowed, but only where it has the limited purpose "of inducing consumers to boycott an unfair *product* or a *distributor* who does business with an unfair producer" unless secondary employees are thereby induced to cease work at the distributor's premises. A. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 274 (1959) (emphasis added). Congress' intent to limit secondary pressure solely to those employers having a "unity of interest" (*Goldfinger* v. *Feintuch*, 276 N. Y. 281, 287, 11 N. E. 2d 910, 913 (1937))[14] with the primary employer is reflected in the proviso's express language, the contemporaneous statements of the legislators who ultimately enacted it into law, and the meaning accorded the word "produced" in pre-existing labor laws.

a. The history of Section 8(b)(4) has previously been discussed by this Court in *Servette* (377 U. S. at 50-55) and *Tree Fruits* (377 U. S. at 64-71). As noted in those cases, because Section 8(b)(4) broadly prohibited all coercion of a secondary employer "whether it be picketing or otherwise" (*Tree Fruits*, 377 U. S. at 68), Senator Kennedy, the conference committee chairman, introduced a resolution seeking instructions for the Senate conferees who were attempting to resolve the differences between the positions of the House and the Senate. That resolution would have exempted from Section 8(b)(4)'s prohibitions any publicity seeking a consumer boycott of an employer which "produced or distributed" goods

[14] The *Goldfinger* test, according to one contemporary analyst, was that which Congress sought to impose by the publicity proviso. R. Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 Va. L. Rev. 195, 242 (1960). *Goldfinger* was also specifically referred to during the legislative debates by Senator Morse, one of the Senate proponents of a restrictive proviso. II Legislative History of the Labor Management Reporting and Disclosure Act of 1959 ("Leg. Hist."), 1426-7 (September 3, 1959).

involved in a labor dispute.[15] This proposal was not adopted. The conference committee eventually accepted a more narrowly worded proviso which only covered goods "produced," not those "produced or distributed." Congress ultimately enacted this more restrictive language.

Statements by the conferees who reported back to Congress, as well as comments by Congressmen and Senators on the scope of the conference resolution, also demonstrate that the proviso was intended to cover only specific situations. For example, the "Report to the House of Major Changes Made In Griffin-Landrum Bill by Conference Committee" stated:

> The following changes safeguarding the rights of workingmen were made upon the insistence of conferees:
>
> . . . 2. Consumer appeals: the right to publicize nonunion goods to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will also be entitled to publicize, without picketing, *the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute* . . . .[16]

Conferee Thompson reported to the House that these amendments secured "[t]he right to appeal to consumers by methods other than picketing, asking them to refrain from buying goods made by non-union labor and *to refrain from trading with a*

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[15] That resolution read:

> *Provided,* That nothing contained in this subsection (b) shall be construed . . . to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute, without inducing employees to refuse to pick up, deliver or transport any goods, or perform any services at such establishment. . . .

II Leg. Hist. 1383 (August 28, 1959).

[16] II Leg. Hist. 1720 (September 4, 1959) (emphasis added). No conference report was issued in the Senate.

retailer who sells such goods."[17] Representative Libonati likewise commented that "[u]nions can only advertise against an *establishment selling unfair goods.*"[18]

Although "[t]he proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for the support of their case be adequately safeguarded" (*Servette,* 377 U. S. at 55), statements by the Senate conferees also show that the proviso's scope was intended to be a limited one. Senator Kennedy, the conference committee chairman, reported to the Senate that the proviso secured:

> The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a *retailer who sells such goods.*
>
> Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that *that employer or store was selling goods* which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress.[19]

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[17] II Leg. Hist. 1721 (September 4, 1959) (emphasis added).

[18] II Leg. Hist. 1734 (September 4, 1959) (emphasis added). See also the remarks of Representative Hogan ("[P]ublicity other than picketing may be used even on customers of a company with whom the union is having a dispute. For instance, a union in conflict with a manufacturer could use publicity to advise the public that a particular store handles goods produced in a struck shop.") II Leg. Hist. 1818 (September 15, 1959); the remarks of Rep. MacDonald, II Leg. Hist. 1810 (September 8, 1959); and the remarks of Rep. Pucinski, II Leg. Hist. 1820 (September 15, 1959).

[19] II Leg. Hist. 1432 (September 3, 1959) (emphasis added). See also the remarks of Senator Kennedy at II Leg. Hist. 1377 (August 28, 1959):

> Workers would not be denied . . . the traditional right to ask the public not to patronize *one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute.*

(emphasis added).

Conferee Goldwater similarly indicated that the scope of publicity protected by the proviso was intended to be "limited,"[20] and emphasized that the words "producer" and "distributor" were inserted into the proviso as words of limitation:

> [T]he union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B *the distributor—the secondary employer—is distributing goods produced by company A, the producer with whom such labor union has a primary dispute.*[21]

Nowhere in the congressional debates is there any indication that all coercive secondary conduct other than picketing was to be permitted. Admittedly, unions were afforded "safeguards . . . to appeal to the public, even by some conduct which might be 'coercive' " (*Tree Fruits,* 377 U. S. at 69); they were permitted to handbill, advertise, promote a secondary boycott or use other non-picketing methods forbidden by Section 8(b)(4) to coerce a secondary employer as long as that employer had a "unity of interest" with the primary employer. However, to paraphrase *Tree Fruits* (*id.*), "it does not follow from the fact that some coercive conduct was protected by the proviso, that the exception [imposed by the producer-distributor restriction] . . . indicates that Congress had determined that all . . . [coercive secondary activity, apart from picketing, was to be protected]."

b. At the time the proviso was passed, Congress, as this Court observed in *Servette,* was familiar with the usage of the term "produced" in existing labor laws. It knew, for example, that under the Fair Labor Standards Act (the "FLSA") that term included "produced, manufactured, mined, handled, or in any other manner worked on. . . ." (29 U. S. C. § 203(j)), and that under the War Labor Disputes Act "production" was

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[20] II Leg. Hist. 1857 (October 2, 1959).

[21] II Leg. Hist. 1857 (October 2, 1959) (emphasis added).

similarly defined. 377 U. S. at 55-56.[22] Indeed, in 1949, when Congress amended the FLSA definition of the word "produced," it deleted from the coverage of the federal wage and hour provisions those employees who were not "closely related or directly essential to production."[23] Presumably, when Congress thereafter limited the scope of permissible proviso conduct to that which occurred in the context of a "producer-distributor" relationship, it intended that the word "produce[d]," as used in both the proviso and the FLSA, would be given the same or a substantially similar meaning.[24] It would have been superfluous for Congress to include the "producer-distributor" limitation if, as Respondents contend, it was to be given no meaning.

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[22] See, *e.g.*, *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2nd Cir. 1948) (employee who prepares plans for construction of an Army base is not engaged in the production of goods for commerce); *Wilson* v. *Reconstruction Finance Corp.*, 158 F. 2d 564 (5th Cir. 1946) (employees of a company which constructs dwellings for employees of an employer engaged in commerce are "not engaged in the production of goods for commerce" notwithstanding that their activities "benefited the housing occupants"); and *Mitchell* v. *Five Boro Construction Corp.*, 14 Wage and Hour Cas. (BNA) 720 (D.P.R. 1960) (employees engaged in the construction of various military buildings which will require additional work before final use are not engaged in the production of goods for commerce).

[23] Conference Rep. No. 1453, 81st Cong., 1st Sess. *reprinted in* 1949 U. S. Code Cong. and Ad. News 2253.

[24] See, *e.g.*, *United States* v. *Montgomery Ward & Co., Inc.*, 150 F. 2d 369, 376-7 (7th Cir. 1945), cited by this Court in *Servette*, which emphasized the need to give the same meaning to the same word in statutes which are in *pari materia*, particularly related labor relations laws. Moreover, utilization of the FLSA definition would similarly comport with *Servette's* conclusion that, in view of the "producer, processor or manufacturer" language of Section 8(b)(4)(B), producer "must be given a broader reach" than that of a processor or manufacturer. 377 U. S. at 56.

2. Prior Precedent Demonstrates That The Producer-Distributor Restriction Must Be Given Effect

For two decades prior to its decisions in *Pet* and the instant case, the Board, while liberally interpreting the term "producer," nevertheless limited the protection of the proviso to those secondary employers who had a "unity of interest" with the primary employer. The Board neither repudiated the producer-distributor requirement nor construed it to protect all coercive secondary publicity. To the contrary, in each instance where the publicity proviso's exception arguably applied, the Board carefully analyzed the facts to determine whether the requisite "unity of interest" relationship existed.

In *International Brotherhood of Teamsters, Local No. 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961), for example, a union asked customers of retail drugstores to refuse to buy products supplied by a wholesaler with whom the union had a primary dispute. Since the wholesaler " 'handled' the raw materials of the product" and added "his labor in the form of capital, enterprise, and service to the product he furnishe[d] the retailer," the Board held that he was a "producer." 132 NLRB at 907.[25] This reasoning was subsequently approved by

[25] The same approach was utilized in two cases involving a union engaged in a dispute with radio or television stations that requested consumers to boycott those retailers who advertised on that station. *Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.), supra; American Federation of Television and Radio Artists (Great Western Broadcasting Corp.), supra.* In *Middle South Broadcasting*, the Board reasoned that the primary radio station was a producer under the proviso because *"labor* is the prime requisite of one who 'produces'; and therefore an employer who applies his labor to a product, whether of an abstract or physical nature, or in the initial or intermediate stages of the marketing of the product, is one of the 'producers' of the product." 133 NLRB at 1705 (emphasis the Board's). Similarly, in *Great Western Broadcasting*, the Board reasoned that "by adding its labor in the form of capital, enterprise

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this Court in *Servette*.[26] That decision, however, did not hold that the term "producer" had a limitless reach. The dicta that "the protection of the proviso was [not] intended to be any narrower in coverage than the prohibition to which it is an exception" (377 U. S. at 55) does not aid the Respondents. *Servette* only held that " 'producer' must be given a broader reach [than "processor" or "manufacturer"], else it is rendered virtually superfluous." 377 U. S. at 56.[27] Indeed, if *Servette* intended that all non-picketing publicity was to be encompassed within the proviso, it would have been unnecessary for the Court to have then proceeded to analyze the restrictive usage of the term "producer" in other labor legislation. Nor would the Court have been oblivious to the "well-settled rule of

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and service to the products which it advertise[d] [the primary television station] bec[ame] one of the producers of the product which it advertise[d] . . . [and] the secondary employers who [were] retail distributors of the products clearly distribute[d] such products within the meaning of the proviso." 134 NLRB at 1621.

[26] The *Servette* Court concluded that "products 'produced by an employer' included products distributed . . . by a wholesaler with whom the primary dispute exists . . . . [and that] 'producer' must be given a broader reach [than only a 'processor' or 'manufacturer']." 377 U. S. at 55-56.

[27] The Court thus emphasized that the terms "producer, processor, or manufacturer," as used in Section 8(b)(4)(i)(ii)(B), each had to be accorded significance. By the same token, this phrase "does not stand alone, but gathers meaning from the words around it." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). If the terms "producer, processor, or manufacturer" encompass *all* employers, then the immediately proximate phrase contained in Section 8(b)(4)(i)(ii)(B), "or . . . with any other person," would become meaningless. The terms "producer, processor, or manufacturer" must, therefore, be read to merely categorize a subspecie of that whole. Likewise, the proviso's "producer-distributor" language does not embrace all employers, but, instead, refers to a more limited category of employers subsumed within the much wider classification of all employers.

statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott, & Dunning, Inc.*, 412 U. S. 609, 633 (1973).

The Board's post-*Servette* decisions relied upon by the court below, while indicating that the "proviso's producer-distributor language was not to be given a narrow or literal interpretation" (Pet. App., p. 10a), similarly do not indicate that this restriction is to have no effect. It may be true, for instance, that "construction contractors and subcontractors are producers within the meaning of the proviso and that their services are products . . . and that they are also producers of the 'end product' to which their services contribute." Pet. App., p. 11a. For this reason there is no dispute that the Union here could have lawfully handbilled to urge a consumer boycott of Wilson's. However, handbilling seeking a boycott of DeBartolo and the other tenant stores does not involve any "end product" to which High's services contributed. In those shopping center construction cases where this issue has arisen, there was likewise no disagreement that a producer-distributor relationship was present.[28] Apart from *Pet*,[29] therefore, the Board's other deci-

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[28] In *Local Union No. 54, Sheet Metal Workers Int'l Ass'n. (Sakowitz, Inc.)*, 174 NLRB 362 (1969), for example, where the primary employer "was performing construction and services" for the secondary employers (174 NLRB at 364), the sole issue was "whether the publicity proviso protect[ed] handbilling at a store of a secondary employer other than the one at which the services of the primary employer ha[d] been utilized." 174 NLRB at 363. Similarly, in *Nashville Building & Construction Trades Council (Castner-Knott Dry Goods Store)*, 188 NLRB 470 (1971), there was also no dispute that the requisite producer-distributor relationship existed because the secondary employer had directly engaged the primary to build a store to be occupied by the secondary. The sole issue in that case was whether the union's *picketing* violated Section 8(b)(4).

[29] In *Pet*, a union which was engaged in a dispute with one of

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sions provide no support for its position in this case.

B. Aside From Wilson's, High Had No Producer-Distributor Relationship With Either DeBartolo Or Its Tenants

There is no reasonable nexus, even the limited one that existed in *Pet,* between High and DeBartolo or between High and the tenants other than Wilson's. High contracted exclusively with Wilson's to build a store exclusively for Wilson's.

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Pet's many divisions (Hussmann) circulated handbills urging the public to boycott all of Pet's products. Notwithstanding its findings that Pet was a diversified enterprise in which the various divisions "operate[d] essentially as independent business entities," the Board concluded that Hussmann was "a 'producer' of the products of Pet and its other subsidiaries and divisions as that term is used in the publicity proviso" because Hussmann abstractly benefited both Pet and its other subsidiaries. 244 NLRB at 97, 101, 102. The Eighth Circuit reversed. It concluded that the Board had erred for a number of reasons (641 F. 2d at 549): (a) the "Board's interpretation [was] unreasonable and . . . totally at odds with any normal interpretation of the word 'produce' . . . [since it cannot be said] that because Hussmann's profits inure to the benefit of Pet, Hussmann produce[d] Pet's products"; (b) the connection between Pet's products and Hussmann was "highly attenuated" since there were no direct business dealings between Hussmann and Pet or its other divisions, Hussmann did not work on any of the products of Pet, the two employers were not in any way tied together in a producer-distributor chain, and "[s]hould Pet sell Hussmann tomorrow, Pet would manufacture, distribute, and promote its products the same way it [was then] doing"; (c) the Board's decision did not flow from *Servette* "because the Supreme Court was not there considering a case in which the primary-subsidiary's products and services were unrelated to the secondary-parent's products"; and (d) because Hussmann did "not work on any products of Pet," the Board's view was contrary to the FLSA definition of the term "produced." All of these criticisms of *Pet* are equally applicable to the decisions below in the present case.

Neither DeBartolo, nor the other tenants, selected High, controlled the terms of High's contract with Wilson's, or had an ongoing relationship, past or present, with High similar to that which conceivably could have allowed Pet to control the contractual arrangements of Hussmann. Even assuming that the Board correctly decided *Pet*—which it did not—the relationships in this case are even less compatible with the language and legislative history of the proviso's producer-distributor limitation.

It is true, of course, as the Board recognized, that DeBartolo and each tenant executed a "standard lease" which "imposes mutual obligations in order to achieve financial success." Pet. App., p. 22a, 27a.[30] However, these leases also reflect a large degree of independence between DeBartolo and the tenants and between the tenants themselves,[31] and expressly

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[30] In adopting this position, the Board relied on the following provisions contained in the standard lease (Pet. App., pp. 27a-28a): each tenant agreed with DeBartolo not to injure the shopping center's reputation or interfere with other tenant's business; each tenant agreed with DeBartolo to pay its proportionate share, based upon the size of the tenant's floor area, of the costs for maintaining and operating the shopping center's common areas; each tenant agreed with DeBartolo that its rent would increase when new department stores of a certain size opened; and each tenant agreed with DeBartolo to join the Mall's merchants association and to take part in four advertising brochures.

[31] For example, each tenant pays a minimum rent together with a percentage rent based on the tenant's adjusted gross sales. J. A., pp. 30a-31a. A tenant's rent, therefore, is based entirely on its own success or failure and is not tied to the success or failure of the other tenants or the "mall enterprise." Each tenant's proportionate share of common area maintenance costs is based entirely on the size of its own floor area. J. A., pp. 45a-46a. Each tenant must independently contract and pay for utility services. J. A., pp. 48a-49a. DeBartolo assures that each tenant has the peaceful and quiet enjoyment of the leased premises. J. A., p. 49a. The tenants retain the right to make changes and additions to the leased premises, and DeBartolo retains

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do not create any relationship between DeBartolo and the tenants "other than the relationship of landlord and tenant." J. A., p. 51a.[32] The separate land lease that DeBartolo entered into with Wilson's likewise reflects a substantial degree of independence between these employers as well as between Wilson's and the tenants.[33]

Neither these agreements, nor any other aspect of the relationship between DeBartolo, Wilson's, and the other tenants, supports the Board's view that the other tenants will necessarily "substantial[ly] benefit" from the addition of the Wilson's store. Pet. App., p. 29a. The standard lease only imposes enforceable obligations between DeBartolo and each

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the right to make changes and additions to the shopping center. J. A., pp. 49a-50a. The lease also sets forth a litany of construction work to be performed solely at DeBartolo's expense and to be performed solely at the tenant's expense. J. A., pp. 51a-64a.

[32] Article XXXIV, entitled Relationship Of Parties (J. A., p. 51a), states in its entirety:

> Nothing contained in this Lease shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent or of partnership or of joint venture or of any association whatsoever between Lessor and Lessee, it being expressly understood and agreed that neither the computation of rent nor any provisions contained in this Lease nor any act or acts of the parties hereto shall be deemed to create any relationship between Lessor and Lessee other than the relationship of landlord and tenant.

[33] In addition to a minimum rent obligation, Wilson's also pays a percentage rent based entirely on its *own* adjusted gross sales. J. A., pp. 67a-68a. Wilson's also pays for all utilities and taxes levied against its store and agrees to use "all reasonable efforts" to have its improvements separately assessed. J. A., pp. 69a-70a. Wilson's maintenance payments are also based entirely on the size of its own floor area. J. A., p. 79a. Wilson's must purchase its own indemnity and public liability insurance. J. A., p. 80a. During the period of Wilson's tenancy, title to the Wilson's store remains with Wilson's and not DeBartolo. J. A., p. 81a.

tenant. It imposes no obligations between the tenants themselves, between any tenant and Wilson's, or between any tenant and High. Wilson's, moreover, is party not to the standard lease but to a different land lease agreement. While Wilson's land lease requires that, when it commences business, it will then bear a proportionate share of the costs of maintaining the common areas and join the shopping center's merchants association, these so-called "substantial benefits" are manifestly both inconsequential[34] and common-place. Merchants in geographic proximity routinely band together to provide joint advertising, maintenance, sanitation, security, beautification, and other arrangements. Moreover, while the addition of a new Wilson's department store *may* attract customers to other tenant stores and vice-versa, any tenant who deals in the same or similar lines of products as Wilson's will be confronted with an adjacent competitor who may end up taking away its business. For example, a functioning Wilson's certainly does not add to the income of Belk's, one of its direct competitors. *See supra* note 6, p. 5. Moreover, all tenants automatically have their rent increased by ten percent when a new department store of a certain size, even a competitor, opens at the center. J. A., p. 30a. The Board's conclusion that the construction of a new store will necessarily benefit other tenants is, therefore, speculative and, indeed, may even be factually incorrect.

Apart, however, from the nature and significance of the relationship between DeBartolo, the tenants, and Wilson's, High—the primary employer—admittedly does not even share this limited nexus. "High is not a tenant of DeBartolo, does not operate department stores, and has no contract or business relationship with DeBartolo or any tenant other than Wilson's." Pet. App., p. 22a. High does not perform any services for DeBartolo or the tenants. Nor does High handle the products of DeBartolo or the tenants. Thus, even if there was merit to the Board's "symbiotic" relationship interpretation of the

[34] Wilson's only obligation to the merchants association is the payment of dues. J. A., p. 83a.

producer-distributor requirement (Pet. App., p. 28a), that criterion would not govern this case.

More fundamentally, the symbiotic relationship test makes no sense from the standpoint of either its practical consequences or its predictable repercussions. A union that engages in a permissible proviso secondary boycott presumably seeks to pressure the primary employer in two ways: first, if the secondary handles a product of the primary, a boycott of the secondary would correspondingly diminish sales of that product and directly injure the primary; and second, if the secondary handles a product of the primary or performs a service for the primary, or vice-versa, the secondary is able to threaten to cease doing business with the primary unless the labor dispute is resolved. The handbilling directed at DeBartolo and the tenants, apart from Wilson's, can accomplish neither objective. While the secondary employers were injured by the boycott, that boycott did not cause any concomitant damage to High since the secondary employers did not distribute any product produced by High. Similarly, because neither DeBartolo, nor the tenants other than Wilson's, have any "unity of interest" with High, they could exert no real influence to resolve the underlying labor dispute.[35] The effect of the Union's hand-

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[35] *Cf., e.g., Local Union No. 438, Plumbing and Pipe Fitters (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), *enf'd.*, 490 F. 2d 323 (4th Cir. 1973); and *Local No. 742, United Brotherhood of Carpenters (J. L. Simmons Co.)*, 201 NLRB 70 (1973), noting that, under Section 8(e) of the Act, the Board has consistently disallowed work preservation clauses where the signatory employer exercises no control over the assignment of that work to unit employees. Accordingly, a strike or threat to strike over the assignment of such work has been found to have an unlawful secondary objective in violation of Section 8(b)(4)(B) because, as here, that activity is directed against an employer who cannot exert influence over the underlying labor dispute. See also *N.L.R.B.* v. *International Longshoremen's Ass'n*, 447 U. S. 490, 504 (1980), quoting *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 386 U. S. 612, 644-645 (1967) (work preservation

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billing was to injure neutral, unrelated companies[36] who had no control over or power to terminate the source of the Union's dissatisfaction.[37]

The ramifications of the decision below on labor stability are both far-reaching and nonsensical. As noted in the petition for certiorari, if the contractor of one shopping center tenant is related to the shopping center and the other tenants as a "producer," then numerous other employers are identically situated. Any labor dispute involving the bank that loans money, the scavenger service that collects refuse, the carrier

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clauses may be transacted between an employer and a union only where "the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.")

[36] By contrast, the Board has been sensitive to the plight of neutral employers who are geographically related to a primary employer on the same shopping center premises where the issue concerns the proper *location* of the conduct. See, *e.g., Giant Food Markets, Inc.*, 241 NLRB 727, 729 (1979), *enf. denied*, 633 F. 2d 18 (6th Cir. 1980) ("[a]nother factor to be taken into account is the likelihood of a union's picketing enmeshing neutral employers in its dispute with a particular store in a shopping center"), and *Scott Hudgens*, 230 NLRB 414, 417 (1977) ("the likelihood of enmeshing neutral employers ... weigh[s] against requiring the pickets to remove to public property.")

[37] The Board has suggested that DeBartolo and the tenants could pressure High by a "number [of] weapons, ranging from simple peer pressure to threats of leaving the mall or of instituting legal proceedings." Brief of the Board to the court below, p. 30. These alleged options are specious. Since High and neither DeBartolo nor the tenants are "peers," any pressure would have to be exerted on Wilson's. That putative leverage is not only of dubious efficacy, but, in addition, highlights the fact that a tertiary boycott, or a secondary boycott once removed, is really involved in this case. Any pressure generated by a tenant's threat to leave the shopping center would, in actuality, be negligible; the standard lease locks each tenant into a one year lease term. The additional reference to the institution of "legal proceedings" on its face makes no sense.

that provides insurance coverage, the printer that prepares literature, or an endless list of other companies that do business—large or small, continuing or occasionally—with any one tenant could now extend to the shopping center owner and the other tenants. In the case of super-regional shopping centers the number of potential employers who could become involved is staggering. In Woodfield Mall near Chicago, for example, there are some 230 tenant stores, ranging from large department stores such as Sears and Lord & Taylor to small specialty stores such as the Puppy Palace and The Tinder Box.[38] If any one of the numerous companies that an employer such as Sears may do business with becomes involved in a labor dispute, under the decisions below, that controversy could now envelop these purely local specialty stores. Conversely, if the dog food purveyor to the Puppy Palace has a disagreement with a union, under the same symbiotic benefit reasoning the dispute could be extended to Sears although it may, in fact, distribute a competing brand of dog food.

A multitude of other pernicious consequences would also arise if the Board's symbiotic relationship theory is upheld. The relationship between the common tenants of an office building or industrial park is equivalent to the relationship between the stores located in a shopping center. Likewise, the varied sales and service establishments that do business on a common commercial street also have a mutually beneficial relationship: each attracts consumers who will do business with the other stores; they may all belong to a merchant association which engages in promotional and advertising activities similar to the East Lake Square Mall Merchants Association; they may all participate in an arrangement to provide security, sanitation, and similar services; and they may frequently all belong to local chambers of commerce because of a wide variety of shared interests. Under the decision below, therefore, if a single store

[38] *Mall Talk-The Selling of the Presents 1980,* TWA Ambassador, pp. 21-22 (December, 1980).

became engaged in a labor dispute, that controversy could be extended to all the other establishments who occupy the same building, or who are located in the same industrial park, or who happen to simply front on the same thoroughfare. Indeed, the Board's logic would similarly apply to the numerous establishments that merely happen to be located in the same geographic area. For example, the opening of a new ski resort would benefit local ski shops, the presence of a new factory would benefit local merchants, and the opening of a new convention center would benefit local hotels and restaurants, all in much the same manner as the other center tenants in this case would be benefited by a functioning Wilson's. The decisions below would thus widen industrial strife to encompass innumerable neutral employers whom Congress sought to insulate from the devastating effects of a secondary boycott.[39]

C. Restricting The Publicity Proviso To Those Situations Encompassed By A Producer-Distributor Relationship Is Consistent With The First Amendment

The Respondents will no doubt contend that if the publicity proviso is not extended to encompass secondary situations other than those where there is a producer-distributor relationship, the proviso would contravene the First Amendment. This Court should consider this argument[40] and reject it.

The spectre of transgressing the First Amendment has frequently been raised by those seeking to expand the publicity

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[39] As noted in the petition for certiorari, the effect of the expansion of labor disputes occasioned by the decisions below is compounded by the greatly increased use of secondary consumer boycotts which in many instances have now "replaced" or "substantially supplemented" the primary strike as a "union's ultimate weapon." Zimmerman, *The Changing Arsenal of Economic Weapons; Consequences for Section 8(b)(4), The Board and The Courts,* 117 Daily Lab. Rep. (BNA) D-1 (June 18, 1981).

[40] See, *e.g., N.L.R.B.* v. *Catholic Bishop of Chicago,* 440 U. S. 490, 499-500 (1979); and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10, 17 (1963).

proviso beyond its statutory limitations. "The prohibition of inducement or encouragement of secondary pressure," however, "carries no unconstitutional abridgment of free speech." *Int'l. Brotherhood of Electrical Workers Local 501* v. *N.L.R.B.*, 341 U. S. 694, 705 (1951); see also *Carpenters and Joiners, Local No. 213* v. *Ritter's Cafe*, 315 U. S. 722 (1942). As this Court indicated again last Term, secondary boycotts "by labor unions may be prohibited as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" *N.A.A.C.P.* v. *Claiborne Hardware Co.*, ____ U. S. ____, 73 L. Ed. 2d 1215, 1236 (1982).

Economic activity "designed not to communicate but to coerce" (*International Longshoremen's Association* v. *Allied International, Inc.*, 72 L. Ed. 2d at 32) may be regulated notwithstanding that "such regulation may have an incidental effect on rights of speech and association." *N.A.A.C.P.* v. *Claiborne Hardware Co.*, 73 L. Ed. 2d at 1235. This principle has been applied to the "compulsive features" (*Hughes* v. *Superior Court*, 339 U. S. 460, 468 (1950)) or coercive objective of labor speech (*Building Service Employee Int'l. Union* v. *Gazzam*, 339 U. S. 532, 539-40 (1950)) as well as to employer speech (see *N.L.R.B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469 (1941)). It has also been applied to coercive "pure speech" as well as to picketing; the use of one form of coercion rather than another is "a distinction without a difference[.] [T]he Court which rejected First Amendment objections to § 8(b)(4) had 'speech' as well as 'picketing' inducements in mind." *N.L.R.B.* v. *Local Union No. 3, Int'l Brotherhood of Electrical Workers*, 477 F. 2d 260, 266 (2nd Cir. 1973), *cert. denied*, 414 U. S. 1065 (1973). Thus, to characterize the Union's conduct as protected speech "does not end the relevant constitutional inquiry." *N.A.A.C.P.* v. *Claiborne Hard-*

ware Co., 73 L. Ed. 2d at 1235. Rather, the inquiry must focus upon whether, if such speech were regulated, that regulation would comply with the criteria articulated by this Court in *United States* v. *O'Brien*, 391 U. S. 367 (1968). Since there is no question that Congress has constitutional authority to protect interstate commerce from the disruptive effects of secondary boycotts, the critical question is whether the regulation of coercive "speech" in this case, like the acknowledged permissible regulation of coercive picketing,[41] also "furthers an important or substantial government interest . . . unrelated to the suppression of free expression . . . [in which] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U. S. at 377.

The relevant constitutional inquiry must, of course, be made "in the context of its labor relations setting" (*N.L.R.B.* v. *Gissel Packing Co.*, 395 U. S. 575, 617 (1969)), and, in determining whether "First Amendment values must yield to other societal interests," that judgment must recognize the "differing natures, values, abuses, and dangers" (*Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 501 (1981)) of the conduct involved. Union conduct designed to exert economic pressure, like commercial advertising, involves "primarily economic" interests (*Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976)), which, in comparison to political speech, do not rest "on the highest rung of the hierarchy of First Amendment values." *N.A.A.C.P.* v. *Claiborne Hardware Co.*, 73 L. Ed. 2d at 1236. By contrast, here there is a "strong governmental interest" (*N.A.A.C.P.* v. *Claiborne Hardware*, 73 L. Ed. 2d at 1235) in "preserving [the] economy against the stagnation that could be produced by [the] disruption of the business of employers with whom [unions] have no primary dispute." *American Radio*

[41] See, *e.g.*, *International Longshoremen's Ass'n* v. *Allied International, supra; N.L.R.B.* v. *Retail Store Employees Union, Local 1001 ("Safeco")*, 447 U. S. 607, 616-17 (1980)).

Ass'n. v. *Mobile Steamship Ass'n. Inc.*, 419 U. S. 215, 231 (1974).

The "coercive nature of the secondary conduct, whether it be by picketing *or otherwise*" (*Tree Fruits*, 377 U. S. at 68 (emphasis added)) is at the core of the substantial governmental interest addressed by Congress. Non-coercive activity, such as handbilling, which does not urge a boycott of the secondary employer but only appeals to the public to support a union in a labor dispute, is outside the Act's proscription.[42] The justification for banning secondary boycotts is, after all, only "to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employers."[43] Congress even specifically allowed some coercive secondary activity: picketing directed at a struck product as sanctioned by *Tree Fruits* and *Safeco*, or other publicity which, as explicitly provided for in the proviso, does not involve either picketing, the use of falsehoods, the effect of cutting off deliveries or inducing a secondary employer to cease work, or a secondary employer who does not have a producer-distributor relationship with the primary disputant. The Act's prohibitions are thus "narrowly drawn" (*Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 565

[42] See, *e.g.*, *Chicago Typographical Union No. 16 (Alden Press, Inc.)*, 151 NLRB 1666 (1965), holding that picketing and handbilling at shopping centers and public buildings to publicize a labor dispute did not constitute restraint and coercion under Section 8(b)(4) because this conduct was not directed at a secondary employer.

[43] II Leg. Hist. 474 (1959). See also Judge Learned Hand in *I. B. E. W., Local 501* v. *N.L.R.B.*, 181 F. 2d 34, 37 (2nd Cir. 1950), *aff'd*, 341 U. S. 694 (1951) ("The gravemen [sic] of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands."); *Burr* v. *N.L.R.B.*, 321 F. 2d 612, 621 (5th Cir. 1963).

(1980)) to address "isolated evils" (*Tree Fruits*, 377 U. S. at 71) and do not restrict First Amendment freedoms to any greater extent than that needed for the furtherance of the substantial government interests involved. This carefully wrought Congressional accommodation is, in assessing "the constitutional boundary line between the competing interests of society" (*Hughes* v. *Superior Court*, 339 U. S. at 466), "entitled to great deference." *Tree Fruits* 377 U. S. at 93 (Harlan, J., dissenting).

The Union and its members here were also left with "many ways . . . [to] express their opposition to [High's policies] . . . without infringing upon the rights of others" in the manner proscribed by the Act. *International Longshoremen's Ass'n*, 72 L. Ed. 2d at 32. As noted above, the Union in this case was free to picket High as well as handbill at any location to either advise the public not to patronize High and Wilson's or to non-coercively publicize its dispute. In these situations, the activity would either have been primary or protected by the publicity proviso exception. These alternative means of communication are a "relevant factor" where, as in this case, the Court is "called upon to balance First Amendment rights against legitimate governmental . . . interests." *Pell* v. *Procunier*, 417 U. S. 817, 824 (1974).

Apart from furthering important governmental interests, the regulation of coercive speech also advances goals that are unrelated to the suppression of communication.[44] The combination of fear, prudence, and social embarrassment inherent

[44] Unlike, for example, *Cohen* v. *California*, 403 U. S. 15, 19 (1971), the secondary boycott prohibition is not directed at "the substantive message" conveyed. Nor is there any evidence that Congress had "as an ulterior motive the suppression of speech." *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. at 510. Nor is Congress' judgment "so unusual as to raise suspicions in itself" (*id.*) that the suppression of speech *per se* was the intended object of Congress' prohibition.

in coercive speech extends "beyond the aspect of mere communication as an appeal to reason." *Hughes* v. *Superior Court,* 339 U. S. at 468. By resorting to coercive tactics against neutral parties, the Union exceeded the bounds of protected speech. It matters not that the Union did not choose picketing as its particular form of coercion; this Court has long recognized that "in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally . . . may no more be disregarded than pressure exerted in other ways." *N.L.R.B.* v. *Virginia Electric & Power Co.,* 314 U. S. at 477. "[I]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 502 (1949). Indeed, as this Court recognized in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.,* 391 U. S. 308, 315-16 (1968), "[h]andbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets, . . . [which] may in some cases constitute an interference with the use of public property greater than that produced by [picketing]." As here, where " 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien,* 391 U. S. at 376.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the judgment of the Court of Appeals be reversed and that this case be remanded to that Court with instructions to deny enforcement of the Board's order and to remand the case to the Board for entry of an appropriate remedial order.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD J. DEBARTOLO CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether handbills publicizing a labor dispute with a building contractor hired by a tenant of a shopping mall and appealing to consumers not to patronize the mall are protected by the publicity proviso to Section 8(b)(4) of the National Labor Relations Act.

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Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257 (1961) 18

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Fleming, *Title VII: The Taft-Hartley Amendments*, 54 Nw. U. L. Rev. 666 (1960) 31

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Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 Va. L. Rev. 1023 (1953) 45

Labor-Management Reform Legislation: Hearings on H.R. 3540 et al. Before a Joint Subcomm. of the House Comm. on Education and Labor, 86th Cong., 1st Sess. (1959) 16, 19, 25, 26, 28

Labor Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. of Labor the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess. (1959) 16

NLRB, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* (1959) 15

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 662 F.2d 264. The decision and order of the National Labor Relations Board (Pet. App. 19a-30a) are reported at 252 N.L.R.B. 702.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on October 20, 1981. A petition for rehearing was denied on January 26, 1982 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on April 23, 1982, and granted on October 12, 1982.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Before granting the petition for a writ of certiorari, the Court requested the parties to address the question of mootness referred to by the court of appeals (Pet. App. 4a n.2). Supplemental Memoranda were filed on July 15, 1982.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. Br. 2-3.

STATEMENT

A. The Board's Findings of Fact

1. *The relationships among petitioner and the mall tenants*

Petitioner Edward J. DeBartolo Corporation, an Ohio corporation, is engaged in the business of managing and leasing space in shopping center malls (Pet. App. 20a; A. 20a).[2] One of the shopping centers that it owns and operates is the East Lake Square Mall in Tampa, Florida (Pet. App. 21a; A. 20a).

During the period in question, about 85 tenant-merchants occupied stores at the mall, each under the terms of a standard lease agreement with petitioner (Pet. App. 21a; A. 28a-64a). Under that lease, each tenant was to make monthly payments to petitioner consisting of a specified "minimum rent" and an additional "percentage rent," calculated as a given percentage of the tenant's annual adjusted gross sales in excess of a specified figure (Pet. App. 22a; A. 30a-31a). The tenants were also required to pay a proportionate share of the cost of maintaining and repairing the mall's common areas (Pet App. 22a; A. 42a-47a).

Whenever a new tenant located at the mall, the proportionate share of the common area maintenance and repair costs was reduced for each tenant (A. 22a).[3] The

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[2] The parties waived a hearing before an administrative law judge, and the case was submitted to the Board on the formal papers, a stipulation of facts, and the accompanying joint exhibits (Pet. App. 19a; A. 19a). "Pet. App." refers to the appendix to the petition for certiorari; "A." refers to the joint appendix to the briefs in this Court. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

[3] The opening of a new department store or variety store reduced the other tenants' costs because the amounts paid by such a store for

standard lease also provided that, once a specified number of department stores had opened at the mall, the opening of each new department store in excess of a certain size would trigger a 10% increase in the monthly "minimum rent" charged the tenants (Pet. App. 22a, 28a; A. 30a).

The lease required all tenants to join and pay dues to a merchant's association that, among other things, was to direct coordinated advertising and promotional campaigns for the mall stores (Pet. App. 22a; A. 40a-41a). Each of the mall tenants accepted policies prescribed by petitioner respecting use of the premises, hours of business, and maintenance of a full staff of employees (Pet. App. 7a; A. 37a-40a). Tenants' plans for constructing their stores were to be submitted to petitioner and (by virtue of a document governing such construction incorporated in the lease) specified that union labor would be used in the construction (Pet. App. 22a; A. 35a-36a, 62a).

The H. J. Wilson Company, Inc., which is engaged in the business of operating retail department stores, signed a lease agreement with petitioner under which it agreed to construct and operate a department store ("Wilson's") at the mall on land owned by petitioner (Pet. App. 20a, 22a; A. 65a-83a). This lease, like the standard form lease, requires the monthly payment of a fixed "minimum rent" together with a "percentage rent" based on a percentage of adjusted gross sales over a certain amount; and it also requires Wilson's to contribute to the cost of maintaining and repairing the common areas and to join and pay dues to the merchants association (Pet. App. 22a; A. 67a, 79a, 83a). The lease specifies the hours that Wilson's is to be open for business and fully staffed, and requires that Wilson's submit its construction plans to petitioner for approval (Pet. App. 22a; A. 77a, 81a-83a). Insofar as the record shows, however, unlike the standard lease, the Wilson's lease does not require Wilson's to re-

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"common area maintenance costs" were to be deducted from petitioner's total costs before the proportionate shares of the other tenants were calculated (A. 45a).

quest its construction contractors to use union labor or otherwise assure that the employees who construct the store are compensated at a level at least equal to established area standards.[4]

2. *The Union's handbilling*

Wilson's contracted with H.J. High Construction Company to build its store at the mall. Subsequently, the Union (respondent Florida Gulf Coast Building Trades Council) became involved in a primary labor dispute with High over the payment of allegedly substandard wages and fringe benefits to construction employees (Pet. App. 22a; A. 23a, 24a). In connection with its dispute with High, the Union distributed handbills at the four entrances to the mall, commencing on December 13, 1979, and ending on January 4, 1980 (Pet. App. 22a-23a; A. 24a).[5]

In the handbills, the Union appealed to the public not to shop at the mall, stating (A. 84a): "[t]he Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits." It explained that, in the past, "the Mall's owner, The Edward J. DeBartolo Corporation ha[d] * * * insure[d] that the Mall and its stores [were] built by contractors who pay fair wages and fringe benefits" but that the mall owners were now "permitting our

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[4] "Exhibit E" referred to in Section 1 of Article XXII of the Wilson lease, "Construction of Tenant's Improvements"—"Plans and Specifications" (A. 81a), is not part of the record in this case.

[5] The Union also engaged in handbilling between January 8, 1980, and January 17, 1980, at the entrances to a department store known as Belk's, located near the mall stores operated by petitioner's tenants (A. 26a); that activity was not included in the complaint (A. 6a-11a). Counsel for the General Counsel expressly advised the Board that the handbilling at Belk's was not part of the case and that, as permitted by paragraph 25 of the Stipulation of Facts, he accordingly objected to the stipulations respecting Belk's as immaterial (A. 27; General Counsel's Br. 4). The Board's decision concerns only the handbilling specified in the complaint (Pet. App. 22a-23a; A. 9a).

standards to be torn down" (*ibid.*). It queried whether the mall owner intended to compensate for the "decreased purchasing power of workers" resulting from "low construction wages" by "encouraging the stores in East Lake Mall to cut their prices and lower their profits" (*ibid.*). The Union asked the public not to "patronize the stores in the * * * Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits" (A. 84a-85a). The handbill also addressed those members of the public who "MUST ENTER THE MALL TO DO BUSINESS," asking them to "express to the store managers your concern over substandard wages and your support of our efforts." Finally, the Union stated that its appeal was "only to the public—the consumer" and that it was "not seeking to induce any person to cease work or to refuse to make deliveries" (A. 85a).[6]

On December 20, 1979, petitioner's counsel wrote to the Union stating that petitioner would not take action to restrict the handbilling if, among other things, it were limited to the immediate vicinity of the Wilson's construction site and the language of the handbill were changed to state that the Union had no dispute with either petitioner or any of its lessees other than Wilson's (A. 87a-88a). The Union continued to distribute its handbills at the mall entrances until January 4, 1980, when the activity was enjoined by a state court (Pet. App. 2a, 22a-23a; A. 24a).[7]

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[6] No one asserts that the handbilling was other than orderly and peaceful, that it was accompanied by any picketing or patrolling, or that it induced any individual employed by any person other than High, the primary employer, to refuse, in the course of his employment, to pick up, deliver, or transport any goods, or to perform any services (Pet. App. 24a).

[7] The state court litigation was an action in trespass under state law; no issues concerning the trespass are raised in the present case (see page 12 note 13, *infra*).

B. The Board's Conclusions and Order

Petitioner filed unfair labor practice charges against the Union, and the case came before the Board on the complaint subsequently issued by the General Counsel of the Board alleging that the Union had violated Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. 158(b)(4)(ii)(B). Following its decision in *United Steelworkers (Pet, Inc.)*, 244 N.L.R.B. 96 (1979), rev'd and remanded, *Pet, Inc.* v. *NLRB*, 641 F.2d 545 (8th Cir. 1981), the Board dismissed the complaint on the ground that the Union's handbilling was protected by the publicity proviso to Section 8(b)(4).[8]

With an exception not relevant here, the proviso exempts from the ban on secondary boycotts "publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." In *Pet*, the Board noted that this Court's decision in *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964), and a long line of Board decisions both preceding and following *Servette*, have made clear that, given Congress's reasons for enacting the publicity proviso, the proviso is not to be given a narrow construction. Accordingly, the language referring to "products produced by [a primary] employer" and "distributed by another employer" does not limit the proviso to situations in which a union, by nonpicketing publicity, requests the public not to patronize a store that sells goods manufactured by an employer with whom the union has a primary dispute. 244 N.L.R.B. at 100-101. In this case, as in *Pet*, the Board concluded (Pet. App. 27a-29a) that the labor organization's publicity urging a consumer boycott of neu-

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[8] Member Penello would have remanded the case for a hearing on a factual issue relating to the truthfulness of the handbills, a matter he considered unresolved. He did not address the question whether the handbilling was otherwise within the proviso's protection (Pet. App. 29a-30a).

tral employers—i.e., those not involved in the primary dispute—came within the protection of the proviso because of the particular economic linkage between the "product" in question (here the retail store constructed by High as part of the mall enterprise) and the neutral employers at whom the handbilling was in part directed.[9] High had contributed its labor to a retail store that, when it began operation, would produce economic fruits in which petitioner and all of the mall tenants would share because of the "symbiotic nature" of their relationships (Pet. App. 28a).[10]

C. The Court of Appeals' Decision

The court of appeals affirmed the Board's decision, finding that the Board had properly rejected petitioner's

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[9] In *Pet*, the union's primary labor dispute was with the Hussmann Refrigerator Company, a wholly owned subsidiary of Pet, Inc. The Board found that Hussmann contributed to the economic advancement of Pet's other subsidiaries and divisions, just as they contributed to the success of Hussmann's operations. 244 N.L.R.B. at 97-98, 101. Because of this economic interdependence among the various parts of Pet's diversified corporate family, the Board held that the Section 8(b)(4) proviso protected the Union's nonpicketing publicity seeking public support for a boycott of all Pet products. 244 N.L.R.B. at 102.

[10] The Board rejected petitioner's contentions that the handbill fell outside the proviso because it was untruthful "in that (a) the request that the public not shop at any store in the Mall includes employers who are totally neutral to the primary dispute, (b) the handbill does not identify with whom the Union has a primary dispute, and (c) Respondent does not have a dispute with any producer of products of [petitioner] or the tenant employers other than Wilson's" (Pet. App. 26a & n.2, 27a). The Board regarded the first and last of these contentions as other ways of raising the legal question regarding the application of the "produced"/"distributed" language of the proviso. As to the second contention, the Board found that the omission of High's name did not render the handbill untruthful, since the handbill accurately stated that the Union believed that Wilson's was being built by a "contractor" that paid substandard wages and benefits, and since it asked consumers not to patronize the mall stores until assurances were given by the mall owner that any new stores would be built by "contractors" that pay fair wages and benefits (*ibid.*).

truthfulness contentions (Pet. App. 5a-6a) and that the Board had properly concluded that the producer-distributor "relational requirement" of the publicity proviso was satisfied in this case (Pet. App. 6a-14a).[11]

As to the latter question, the court noted the interdependence of petitioner and the mall tenants (including Wilson's), an interdependence that was established both by the lease agreements and by the degree to which all involved in the "mall enterprise" contributed to the financial success of each. The court of appeals found (Pet. App. 8a-12a) that the relevant legal precedents, including the Court's decision in *NLRB* v. *Servette*, *supra*, dictate a liberal construction of the proviso so as not to "defeat its clear purpose of protecting labor's ability to publicize by means other than picketing its grievances to consumers" (Pet. App. 10a). In light of these considerations, the court found both "rational" and "consistent with the Act" the Board's conclusion that High in effect produced part of the "mall enterprise" by constructing the Wilson's store, and that all engaged in that enterprise "distributed" it within the meaning of the proviso, regardless of whether they were contractually linked with High or otherwise directly involved in the primary labor dispute over construction wages (Pet. App. 12a).

The court denied petitioner's request for rehearing en banc, four judges dissenting (*id.* at 33a-34a).

SUMMARY OF ARGUMENT

In 1959, Congress expanded the secondary boycott restrictions of Section 8(b)(4) of the National Labor Relations Act, but excluded "publicity, other than picketing" from the reach of the expanded Section 8(b)(4). The legislative history of the 1959 amendment indicates that the so-called publicity proviso to Section 8(b)(4) was intended to protect a union's right to appeal to consumers for

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[11] District Judge Britt, sitting by designation, dissented (Pet. App. 15a-18a).

support by means other than picketing. Under the proviso a union may lawfully publicize a primary labor dispute and urge consumers to boycott secondary employers, so long as the message is truthful, is communicated without the use of pickets, and does not result in a work stoppage by employees other than those of the primary employer. In the language of the proviso, Section 8(b)(4) does not "prohibit publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom [a] labor organization has a primary dispute and are distributed by another employer * * *" (29 U.S.C. 158(b)(4)).

The proviso was added during conference committee consideration of proposed labor reform legislatior because of concern that the broad language of the House provision expanding secondary boycott restrictions might otherwise violate the First Amendment. *NLRB* v. *Servette, Inc.*, 377 U.S. 46, 55 (1964); *NLRB* v. *Fruit & Vegetable Packers, Local 760* (*"Tree Fruits"*), 377 U.S. 58, 69 (1964). Respecting that broad purpose, this Court rejected a narrow reading of what may be called the producer/distributor language of the proviso in *Servette*, noting (377 U.S. at 55) that "[t]here is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception * * *."

The Board has not read *Servette* to permit disregarding the producer/distributor language altogether. Nonetheless, in light of *Servette* and the legislative history of the proviso, it has properly found the producer-distributor requirement satisfied whenever, as here, it finds that the primary employer produces a product, broadly defined, that is in some manner distributed by the employers at whose customers the nonpicketing publicity is immediately directed. Petitioner properly disclaims (Br. 20) any argument that the Union is barred from distributing handbills that urge the public not to shop at Wilson's,

and thus concedes that, for purposes of the proviso, High, the construction contractor, produced a product—the Wilson's store—that is distributed by Wilson's in operating the store as a retail enterprise. Given the interdependence of petitioner and all of its mall tenants (including Wilson's), which cooperate in the shopping center enterprise at the mall, the Board reasonably concluded that High's product benefits petitioner and all of its tenants and, more importantly, is distributed by them through their activities at the mall. That reading of the proviso by the Board and the court below respects its basic purpose of avoiding possible First Amendment difficulties.

Contrary to petitioner's contention, the Board's reading of the proviso is not refuted by the occasional references made by members of Congress to the rights of unions to appeal to the public concerning the sale by retail stores of unfair, or "struck," goods. In using such language, the speakers referred to the most common example of union secondary appeals to consumers; indeed, petitioner's concession that the Union could properly have urged a boycott of Wilson's seems to acknowledge that the publicity proviso protects far more than a union's right to follow unfair retail goods. The unions' traditional right to follow struck goods down to the retail level had been frequently invoked by union witnesses during the hearings that preceded the 1959 amendments, and, as this Court held in *Tree Fruits*, Congress responded to that imperative by not including within the basic Section 8(b)(4) concept of restraint and coercion any appeals to consumers—even by means of picketing—not to buy struck goods. The proviso, however, permits appeals to consumers—by means other than picketing—to boycott a secondary employer altogether, not just the unfair or struck product. Congress was not concerned with narrowly circumscribing a class of secondary employers to whose customers unions could make such a general appeal. Decisions of this Court gave Congress reason to believe that there was much more latitude under the

First Amendment for regulating picketing than other forms of communication. In enacting the proviso, Congress focused on this constitutional distinction between picketing and other means of communication that lacked the "compulsive features" (*Hughes* v. *Superior Court*, 339 U.S. 460, 468 (1950)) of picketing.

Accepting petitioner's contention that the message of the handbill in this case is outside the proviso's protection and a violation of Section 8(b)(4) of the Act would require the Court to decide a First Amendment question that should be avoided if at all possible. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-501, 507 (1979). Given this Court's recognition of constitutionally significant differences between picketing and the communication of a message without picketing, petitioner's construction of the proviso raises substantial constitutional questions. Those questions should be avoided here by upholding the Board's decision.

ARGUMENT

THE HANDBILLS PUBLICIZING THE DISPUTE WITH THE BUILDING CONTRACTOR AND REQUESTING CONSUMERS NOT TO PATRONIZE THE MALL WERE PROTECTED BY THE PUBLICITY PROVISO TO SECTION 8(b)(4) OF THE NATIONAL LABOR RELATIONS ACT

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), was enacted in 1959 as part of the Landrum-Griffin amendments to the Act.[12] That provision prohibits a labor organization from "threaten[ing], coerc[ing], or restrain[ing] any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is * * * forcing or

[12] The amendments to Section 8(b)(4) of the NLRA were contained in Section 704 of the 1959 legislation, which was formally titled the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 542.

requiring any person * * * to cease doing business with any other person." 29 U.S.C. 158(b)(4)(ii)(B). An exception to the prohibitions of Section 8(b)(4) of the Act is contained in what has come to be called the "publicity proviso" to Section 8(b)(4), also enacted in 1959. The proviso states:

> [F]or the purposes of * * * paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution[.]

The handbilling at issue in this case was "publicity, other than picketing," and it did not result in any refusals to work by employees at the mall or by employees who arrived to make deliveries. Petitioner's only complaint is that the handbills included certain references to petitioner and to its tenant stores other than Wilson's.[13]

Petitioner contends (Br. 10-28) that the reference in the proviso to "products" that are "distributed" by an

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[13] This case raises no issue concerning any right of the Union to distribute handbills on property belonging to the shopping center owner. As the court of appeals noted (Pet. App. 14a-15a), no contention respecting the location of the handbilling was raised before the Board. Compare *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 200-202, 204-205 (1978); *Hudgens* v. *NLRB*, 424 U.S. 507, 521-523 (1976). Petitioner presumably would make the same arguments even if the mall entrances were adjacent to public sidewalks and those distributing the handbills scrupulously avoided stepping onto petitioner's property.

employer other than the primary employer makes it inapplicable in this case. In petitioner's view, Congress intended the proviso to apply to employers like Wilson's that distribute the product of a construction contractor by using that product in its retail merchandising operation, but not to employers like petitioner and its other tenant stores at the mall that distribute the "product" insofar as they are all part of a cooperative merchandising effort at the mall defined by the terms of the leases petitioner has negotiated with Wilson's and the other tenants. Thus, petitioner argues that the Union's appeal for consumer action extending beyond a refusal to patronize Wilson's falls outside the proviso's protection.[14]

We submit that, as explained in this Court's unanimous opinion in *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964), the legislative history of the 1959 Landrum-Griffin amendments indicates that the publicity proviso is broad enough to encompass publicity urging consumers to withhold their patronage from all of the mall stores. The primary reason for including the proviso was Congress' concern that the legislation might otherwise run afoul of the First Amendment bar to abridgments of freedom of speech. There is no indication that the language of the proviso was intended to limit narrowly the class of employers that could be the subject of consumer boycott appeals by means of "publicity other than picketing." The Board's conclusion that the language of the proviso protects the message of the handbills in this case is reasonable and consistent with congressional intent.

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[14] The further question whether the handbilling here would constitute "coercion" or "restraint" having a proscribed objective within the meaning of Section 8(b)(4), without regard to the application of the proviso (see Pet. Br. 9), was not decided by the Board in this case because it found the proviso applicable.

A. The Legislative History of the 1959 Amendments of Section 8(b)(4) of the Act Compels a Broad Reading of the Language of the Publicity Proviso

1. *Union appeals to customers of secondary employers were not a major target of Congress in enacting the 1959 Amendments*

In undertaking to make changes in the law involving secondary boycotts in 1959, Congress was chiefly concerned with closing three "loopholes" it perceived in Section 8(b)(4) as it then existed. *NLRB* v. *Fruit & Vegetable Packers, Local 706* (*"Tree Fruits"*), 377 U.S. 58, 64 (1964). As enacted in 1947 as part of the Taft-Hartley amendments, Section 8(b)(4) confined its prohibition "in pertinent part * * * to the inducing or encouraging of 'the employees of any employer to engage in, a strike or a concerted refusal * * * to handle * * * any goods.'" 377 U.S. at 64. As this Court explained in *Tree Fruits* (377 U.S. 64-65):

> This proved to be inept language. Three major loopholes were revealed. Since only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a "strike or a concerted refusal" was prohibited, pressure upon a single employee was not forbidden. Finally, railroads, airlines and municipalities were not "employers" under the Act and therefore inducement or encouragement of their employees was not unlawful.

Obviously, the limiting statutory language referred to in connection with the first of these loopholes meant that union appeals to *consumers* not to patronize particular establishments or buy particular products were also permissible, but that omission was not perceived as comparable to the three "major loopholes" described in *Tree Fruits*.

As the Court observed in *Tree Fruits* (377 U.S. at 65), while the Eisenhower Administration introduced a

bill to strengthen the secondary boycott prohibitions,[15] the Secretary of Labor and the bill's Senate sponsor, Senator Goldwater, did not, in their remarks in support of the bill, refer to consumer picketing as making the amendments necessary.[16] Similarly, with respect to the Landrum-Griffin bill passed by the House, which "embodied the Eisenhower Administration's proposals as to secondary boycotts[,]" [17] the *Tree Fruits* Court noted (377 U.S. at 67) that Representative Griffin, in introducing the bill, made no reference to consumer picketing as an evil at which the bill was directed.[18] Needless to say, if consumer *picketing* was not then regarded as a special problem by the advocates of new secondary boycott restrictions, union secondary appeals to consumers

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[15] See Section 503(a) of S. 748 (86th Cong., 1st Sess. (1959)), I NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* ("Leg. Hist.") 142 (1959). The Administration bill contained language similar to that ultimately enacted with respect to union threats, restraint, or coercion, having as one of its objects, "forcing or requiring any person * * * to cease doing business with any other person."

[16] 105 Cong. Rec. 1283, 6428 (1959), II Leg. Hist. 979, 1079 (remarks of Sen. Goldwater); 105 Cong. Rec. 1729-1730 (1959), II Leg. Hist. 993-994 (remarks of the Sec. of Labor, inserted in the record by Sen. Dirksen).

As this Court pointed out in *Tree Fruits, supra*, 377 U.S. at 65, the interest in expanding prohibitions against secondary boycotts existed in the House and among "some members of the Senate." "[P]revailing Senate sentiment favored new legislation primarily concerned with the redress of other abuses, and neither the Kennedy-Ives Bill, which failed of passage in the House in the Eighty-fifth Congress, nor the Kennedy-Ervin bill, adopted by the Senate in the Eighty-sixth Congress, included any revision of § 8(b)(4)." *Ibid.*

[17] See Section 705(a) of H.R. 8400, 86th Cong., 1st Sess. (1959), I Leg. Hist. 681. The language respecting coercion to force one person to cease doing business with another was identical to that in the Administration bill.

[18] 105 Cong. Rec. 15531-15532 (1959), II Leg. Hist. 1568 (remarks of Rep. Griffin).

made through handbills, leaflets, or other advertising could hardly have been a serious concern of theirs.

This is not to say that members of Congress made no references to appeals directed to customers of secondary employers. In the lengthy House and Senate hearings on proposed labor legislation, a few members of Congress who favored an expansion of boycott prohibitions complained about secondary consumer boycotts. Representative Lafore expressed his view that picketing to encourage such boycotts should be banned (*Labor-Management Reform Legislation: Hearings on H.R. 3540 et al. Before a Joint Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. ("*House Hearings*") 1798-1799 (1959)); and Senator Curtis filed a statement explaining provisions of his bill, in which he proposed dealing with secondary consumer boycotts because, under Section 8(b)(4) as it then existed, "[a] union can apparently picket the customer entrances of a retail store which is carrying a product manufactured by a company with which a union has a primary dispute" and unions could "similarly" organize consumer boycotts against companies for advertising on a radio television station or in a newspaper with which the union had a primary dispute. *Labor-Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. ("*Senate Hearings*") 753 (1959).

Also, during the debates on the proposed labor reform bills a few persons who favored new boycott restrictions commented on secondary consumer appeals. Thus, before the bills passed by the House and the Senate were referred to conference, such boycott activities were adverted to in comments of Representative Lafore (105 Cong. Rec. 3511 (1959), *reprinted in* II NLRB *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* ("Leg. Hist.") 1471 (1959)); in remarks of Senator McClellan concerning a bill he offered (S. 1384, 86th Cong., 1st Sess. (1959)), which was never reported out

of committee (105 Cong. Rec. 3951 (1959), II Leg. Hist. 1007 (1959)), and concerning an amendment to the Kennedy-Ervin Bill (S. 1555, 86th Cong., 1st Sess. (1959), reported by the Senate Labor and Public Welfare Committee) that he offered on the Senate floor and that was rejected (105 Cong. Rec. 6667, 6671 (1959), II Leg. Hist. 1194-1198). All of these speakers, however, referred to union pickets or picket lines. In the House, Representative Griffin also referred to secondary consumer picketing (105 Cong. Rec. 15672-15673 (1959), II Leg. Hist. 1615). Finally, in a speech broadcast over radio and television on August 6, 1959, President Eisenhower expressed the view that any labor reform bill that Congress might enact should address the problem of consumer *picketing* by a union that shuts off patronage of a secondary employer in aid of the union's objectives in a primary labor dispute elsewhere. See 105 Cong. Rec. 19953-19954 (1959), II Leg. Hist. 1842-1843.[19]

The statements of opponents of legislation cannot prudently be taken as authoritative guides to congressional intent, because, "[i]n their zeal to defeat a bill, [legislators] understandably tend to overstate its reach" (*Tree Fruits, supra*, 377 U.S. at 66). Nonetheless, we note that opponents of the proposed extensions of the restrictions on secondary boycotts commented on the conceivable impact on union appeals to consumers for support.[20]

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[19] The President discussed the picketing of a retail furniture store in aid of a dispute with a furniture manufacturer. 105 Cong. Rec. 19953-19954 (1959), II Leg. Hist. 1842.

[20] Thus, remarks by Senator Humphrey concerning proposed amendments offered by Senator Goldwater in April 1959 (105 Cong. Rec. 6232 (1959), II Leg. Hist. 1036) and by Representative Madden concerning the Landrum-Griffin bill in the form in which it went to the conference committee (105 Cong. Rec. 15515 (1959), II Leg. Hist. 1552) were couched in terms so broad as to suggest that the legislation might ban picketing, or even nonpicketing publicity, near the premises of a neutral employer, asking that the public refrain from purchasing the product of a struck employer sold by the neutral.

The paucity of references to secondary consumer-targeted appeals in the hearings and debates prior to the emergence of the final bill from the conference committee lends credence to the observation of Professor Cox that "[t]here is some reason to think that originally the Republicans and Southern Democrats among the House conferees failed to realize that the words of the [Landrum-Griffin bill] were broad enough to reach consumer boycotts and would have agreed to eliminate the prohibition, but President Eisenhower's radio and television appearance placed them in a dilemma." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 274 (1961).[21] The furniture store example could be construed either as a mistaken complaint about picketing that resulted in work stoppages by the retail store employees—illegal since 1947—or as a complaint about picketing that appealed to consumers. *Ibid.* According to Professor Cox, because the Republican conferees chose to assume that the President meant the latter, they could not agree to any conference committee amendments that would lift *all* prohibitions against secondary consumer boycotts, so they "sought to narrow the restriction to the exact illustration used by the President." *Ibid.*

In any event, following the appointment of House and Senate conferees to work out a compromise on the two versions of the proposed labor reform legislation (105 Cong. Rec. 15965, 15913 (1959), II Leg. Hist. 1351, 1702)), Senator Kennedy, who was to preside over the conference, and Representative Thompson, one of the House conferees, issued an analysis of the two bills, which, among other things, criticized the House boycott provisions as overbroad. 105 Cong. Rec. 16591 (1959), II Leg. Hist. 1708. The criticism had two distinct as-

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[21] Professor Cox was an advisor to the Senate Committee on Labor and Public Welfare when the 1959 amendments were under consideration. See 105 Cong. Rec. 17867 (1959), II Leg. Hist. 1411.

pects: the first was that the House bill would prevent a union that had a labor dispute with an employer, such as the Coors Brewery, from picketing a restaurant that sold the employer's product, using "signs asking the public not to buy the product"; the second was that the prohibition of the House bill "reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech." *Ibid.*[22]

As this Court held in *Tree Fruits* (377 U.S. at 69-71), the House and Senate conferees agreed that the prohibitions of Section 8(b)(4) would bar *picketing* aimed at dissuading consumers from patronizing a secondary employer, such as the furniture store, altogether. But picketing of a secondary employer aimed only at persuading consumers not to purchase the products of the employer with whom the union had a primary labor dispute would

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[22] AFL-CIO President George Meany also made the separate points (1) that unions should be free to picket "at the premises of a neutral employer for the purpose of appealing to consumers not to buy the product of an employer on strike" and (2) that banning distribution of leaflets for such a purpose would raise First Amendment problems. *House Hearings* at 128. He complained to the House committee about the Board's decision in *Dallas General Drivers, Local 745*, 118 N.L.R.B. 1251 (1957), in which the Board had found a Section 8(b)(4)(A) violation based on union secondary picketing of retail stores at entrances used by employees as well as customers (although there was no showing of any work stoppage). In that same decision the Board, citing *Hughes* v. *Superior Court*, 339 U.S. 460, 465 (1950), declined (118 N.L.R.B. at 1254 & n.11) to find that distribution of handbills was unlawful, since handbill distribution to the public, "unlike picketing, does not necessarily invite or instigate a work stoppage or refusal to perform services." Speaking of the same Board case, a union attorney complained that the Board had improperly interfered with the union's right to follow "struck goods to a retail outlet" so long as the picket signs were addressed solely to consumers, asking them not to purchase those goods. *House Hearings* at 1954 (testimony of David Previant). See also *id.* at 1009-1010 (testimony of L.N.D. Wells, Jr.).

be permitted.[23] This compromise responded to the complaint that it was unfair to deprive a union of the right to follow a product produced by an employer with whom the union had a dispute over unfair working conditions or other legitimate grievances. It did not, however, address the possible constitutional problems raised by prohibiting *nonpicketing* appeals to consumers to refuse to patronize particular establishments.

As we show below, the publicity proviso was the response to these separate constitutional concerns, and the proviso's reference to "publicity other than picketing" reflects what Congress apparently regarded as a critical distinction, for First Amendment purposes, between picketing and other more purely expressive activity that derives its force entirely from the persuasiveness of the message.

2. *The publicity proviso reflects congressional concern that a broad prohibition of Union publicity urging consumer boycotts of neutral employers might violate the First Amendment*

a. As this Court explained in *NLRB* v. *Servette, Inc.*, *supra*, 377 U.S. at 55, the publicity proviso was "the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded."

Thus, after the conferees had reached a compromise on House and Senate differences, Senator Kennedy explained that, insofar as the House bill had affected "liberties" by prohibiting "even the handing out of handbills or even taking out an advertisement in a newspaper," the con-

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[23] As the Court later held in *NLRB* v. *Retail Store Employees, Local 1001*, 447 U.S. 607 (1980), the prohibition against picketing to dissuade consumers from patronizing a secondary employer nonetheless includes picketing that is aimed only at a struck product if the product constitutes such a substantial part of the secondary employer's business that the picketing would be likely to result in a general boycott of that employer.

ference had remedied the problem by permitting "the giving out of handbills or information through the radio, and so forth" (105 Cong. Rec. 17720 (1959), II Leg. Hist. 1388-1399). The following day, he again explained the protection afforded by the proviso, referring to the most familiar type of secondary consumer appeal made by unions (namely, an appeal to consumers not to buy goods made by nonunion labor) and more generally to "all publicity short of * * * picketing in front of a secondary site." 105 Cong. Rec. 17898-17899 (1959), II Leg. Hist. 1432.[24]

In the House, Representative Griffin's "Summary analysis" of the conference agreement likewise described the

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[24] Senator Kennedy's statement was as follows (*ibid.*):

> The secondary boycott provisions of the House bill would have curtailed legitimate union activities. Accordingly, the Senate conferees insisted that the report secure the following rights:
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> * * * * *
>
> (c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.
>
> Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing.
>
> In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

In a speech delivered on September 14, 1959, and inserted in the Congressional Record, Senator Douglas praised the conferees for modifying the House bill so as to permit "handbills, radio programs, advertisements, etc., aimed at the public, including consumers" in "secondary situations." 105 Cong. Rec. 19904 (1959), II Leg. Hist. 1834.

publicity proviso in terms suggesting that its main thrust was to avoid prohibiting "forms of publicity" other than picketing.[25] Representative Udall congratulated the conferees for "protect[ing] the free speech right to appeal to consumers by nonpicketing methods." 105 Cong. Rec. 18135 (1959), II Leg. Hist. 1722.

As petitioner notes (Br. 14-16), the comments of some members of Congress on the proviso (see, e.g., portions of the remarks of Senator Kennedy (page 21 note 24, *supra*); 105 Cong. Rec. 18133 (1959), II Leg. Hist. 1720 (remarks of Rep. Thompson); 105 Cong. Rec. 17883 (1959), II Leg. Hist. 1427 (remarks of Sen. Morse)) mention the retail sale of goods to consumers. In context, however, those references do not indicate that, in Section 8(b)(4) of the Act, Congress sought to prohibit a union from making a truthful, nonpicketing appeal to customers of a firm that has some economic relationship with the primary employer, but is not a distributor of the primary's goods in the most familiar sense. See Note, *Picketing and Publicity Under Section 8(b)(4) of the LMRA*, 73 Yale L.J. 1265, 1272-1273 & n.36 (1964).[26]

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[25] Representative Griffin explained to the House that the original House bill had prohibited "secondary customer picketing at [a] retail store which happens to sell [a] product produced by [a] manufacturer with whom [a] union has [a] dispute" and that the conference agreement adopted the House provision "with clarification that other forms of publicity are not prohibited * * *." 105 Cong. Rec. 18022 (1959), II Leg. Hist. 1712.

[26] Nor does the Conference Report suggest such a conclusion. In describing the publicity proviso, it quotes the language of the proviso, but provides no gloss on its terms (H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959), I Leg. Hist. 942).

There is no merit to petitioner's contention (Br. 13 & n.14) that a reference by Senator Morse to *Goldfinger* v. *Feintuch*, 276 N.Y. 281, 11 N.E.2d 910 (1937), reveals that Congress intended the proviso to apply only to nonpicketing publicity aimed at customers of employers who had a "unity of interest' with the employer involved in the primary labor dispute, as defined in *Goldfinger*. Senator Morse cited *Goldfinger* (105 Cong. Rec. 17882 (1959), II Leg.

Rather, they only reflect the fact that appeals to consumers of retail goods to boycott nonunion goods or goods produced by an employer with which a union had a dispute was a familiar sort of secondary consumer boycott.

As this Court noted in *Servette* (377 U.S. at 55)—commenting on the position of the employer there, who sought to confine the proviso to cases in which a union's primary dispute was with an employer that physically fabricated goods distributed by another employer whose customers were the target audience for the union's publicity—"[i]t would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with [a] manufacturer or processor." [27] Similarly, the proviso would fall far short

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Hist. 1426) because he understood it as a case concerned with consumer *picketing*; he was concerned that Section 8(b)(4) as it emerged from the conference committee might have the consequence of improperly curtailing unions' freedom to engage in such picketing. In fact, as this Court explained in *Tree Fruits*, *supra*, 377 U.S. at 64 n.7, *Goldfinger* stood for the proposition that consumer picketing that merely followed a struck product and was not "designed to result in a generalized loss of patronage" was generally regarded as lawful. As this Court noted (*ibid.*, quoting from *Goldfinger*, *supra*, 276 N.Y. at 286, 11 N.E.2d at 913), in the case of the former type of picketing, the courts had sometimes declared that the picketed employer possessed a "unity of interest" with the primary employer. This distinction is relevant to Congress' intent respecting restrictions on picketing, but it is immaterial to the constitutional concerns that generated the publicity proviso (see pages 24-30, *infra*).

[27] The employer in *Servette*, like petitioner here (Br. 13-14), sought to buttress its restrictive reading of the proviso by relying on the fact that the version of the proviso enacted into law was narrower than another version that would have allowed truthful publicity other than picketing advising the public "that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute * * *" (105 Cong. Rec. 17333 (1959), II Leg. Hist. 1383). This Court (377 U.S. at 56 n.15) "attach[ed] no significance" to the existence of the alternate version, which "was in a request by the Senate conferees for instruc-

of its basic purpose if Section 8(b)(4) nonetheless bans truthful publicity—other than picketing—because the product involved is not a consumer retail product or because the secondary employer does not directly purchase the product from the employer with which the union has a labor dispute.

We have shown that union appeals to the public for support were not at the core of Congress' efforts to limit secondary activity in 1959. Indeed, there is little evidence to suggest that Congress had any desire at all to restrict appeals to consumers that did not involve picketing, which might operate as a signal to employees to strike secondary employers. When it was fully realized that the language of the Landrum-Griffin bill passed by the House was so broad that it might preclude constitutionally protected speech, the proviso was added to "clarif[y] that * * * forms of publicity [other than picketing] are not prohibited * * *" (105 Cong. Rec. 18022 (1959), II Leg. Hist. 1712). The constitutional concerns that prompted adoption of the proviso do not turn on nice distinctions as to the nature of the "product" involved or whether the secondary employer directly purchases the product from the employer engaged in the labor dispute.

b. Throughout the hearings on the House bills that proposed to broaden restrictions on secondary activity and to add restraints on primary organizational picketing of employers whose employees had indicated no desire to be or-

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tions but not made the subject of debate or vote because Senate and House conferees reached agreement on the proviso."

Although, as petitioner notes (Br. 16-17), the *Servette* Court referred (377 U.S. at 55-56) to the definition of the term "produced" in the Fair Labor Standards Act, 29 U.S.C. (1964 ed.) 203(j), and the application of the term "production" in the War Labor Disputes Act, ch. 144, 57 Stat. 163, 50 U.S.C. App. (1946 ed.) 1502(c), the Court did not hold that Congress had *incorporated* the definitions from those statutes. Rather, it made the point that Congress's familiarity with the use of the terms in those statutes made it unlikely that Congress would have intended the very narrow meaning for which the employer in *Servette* contended.

ganized, there were complaints about inroads on rights of free speech. However, the House committee considering the bill was repeatedly told that, at least where *picketing* was concerned, there was no constitutional problem because picketing was more than mere speech and because the First Amendment did not condemn government prohibitions of such hybrid activity if it had an unlawful objective.[28] The committee was also advised that prohibiting picketing produced no constitutional problem because, as one witness explained (*House Hearings* at 785 (testimony of G. Carroll Stribling)):

> [P]icketing is no longer necessary in order to inform the community as to a labor dispute. There are a number of other methods which do not cause the same damage and loss[,] and which are available and which unions frequently use.
>
> Newspaper advertising, they can even hand out handbills outside the plant.

Similarly, Representative Griffin, after telling a management witness that the committee had heard "over and over again" that union organizational picketing to coerce a company into recognizing the union as the bargaining agent of its employees constituted simply an "exercise of free speech," went on to observe that, if a union were truly intent on persuading people "concerning the merits of a case," it should do so through leaflets or newspaper advertisements. *House Hearings* at 1832. This, he suggested (*ibid.*), was "a more effective way to bring good arguments to the attention of the public" and the target firm's employees.

Only one submission to the House committee specifically argued that there were no constitutional difficulties in pro-

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[28] See, e.g., *House Hearings* at 197 (testimony of Godfrey P. Schmidt) (under recent Supreme Court decisions, no "equation between peaceful picketing and free speech"); *id.* at 718-719 (testimony of Robert Abelow) (Supreme Court decisions uphold ban on secondary picketing); *id.* at 719 (remarks of Rep. Landrum) ("picketing of the type described by the witness is more than free speech"); *id.* at 794 (testimony of G. Carroll Stribling) ("picketing is more than just free speech, it is an incitement to definite action").

hibiting nonpicketing publicity aimed at aiding the union's position in a primary labor dispute through an appeal to consumers not to patronize neutral employers who had business relations with the primary. This argument was made in a statement submitted by the National Association of Broadcasters regarding what it termed the "Secondary Sponsor Boycott" (*House Hearings* at 1669, 1671-1673).[29]

In making its argument, however, the NAB was required to bring the Ninth Circuit's decision in *NLRB* v. *International Association of Machinists Lodge 942* (*Alloy Manufacturing Co.*), 263 F.2d 796 (1959), to the committee's attention. In *Alloy Manufacturing*, an organizational picketing case involving appeals to consumers, the court expressed the view that the constitutionality of prohibiting publicity other than picketing was at least doubtful, even when the publicity has the same ultimate objectives as picketing that might be prohibited without infringing First Amendment rights.[30] The court enforced the Board's order as to picketing because the union had not argued the picketing issue before the Board and hence could not raise it before the court (see Section 10(e) of

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[29] The NAB was complaining about the activities of unions representing radio and television station employees who, in support of their primary disputes with the stations, would sometimes appeal to the customers of businesses that advertised on those stations not to patronize those businesses as long as they bought advertising on the stations during the existence of the labor dispute. *Id.* at 1670.

[30] In *Alloy*, the union had engaged in both picketing and other types of publicity (including circulation of a "We Do Not Patronize" list), aimed at persuading customers of Alloy not to shop there. The Board found that the union had committed a violation of Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A)—coercion and restraint of employees in the exercise of their Section 7 rights—because the appeal to Alloy's customers was calculated to induce Alloy to sign a collective bargaining agreement with the union, although the union had lost an election during the preceding year and did not claim to have the support of a majority of Alloy's employees.

the Act, 29 U.S.C. 160(e)); accordingly, the court expressed no view concerning whether Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), should be construed to permit such picketing, in order to avoid a serious constitutional issue.[31] But the court did state that possible constitutional difficulties induced it to construe the Act as permitting unions to convey messages to the public by means not involving picketing, and the court made clear its view that the potential constitutional problems were more serious than they would be were only picketing at issue. It explained (263 F.2d at 799-800):

> We consider the conduct of the Union of listing and persuasion, excepting picketing, to be within the general area of protection of the first amendment guaranteeing freedom of speech. These aspects are more protected than picketing which, although within said area, "exerts influences, and produces consequences different from other modes of communication." *Hughes* v. *Superior Court*, [339 U.S. 460, 465 (1950)].

Another management witness before the House committee, Charles M. Brooks, who called for expanded prohibitions of both secondary boycotts and coercive organizational picketing, cited *Hughes* v. *Superior Court*, 399 U.S. 460 (1950), and other decisions of this Court upholding restrictions on peaceful picketing to support his contention that *picketing* for unlawful pur-

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[31] The Fourth Circuit reached the issue and held both that Section 8(b)(1)(A) did proscribe such picketing and that there was no constitutional bar to the prohibition. *NLRB* v. *United Rubber Workers, Local 511 (O'Sullivan Rubber Corp.)*, 269 F.2d 694 (1959). This Court ultimately held, on purely statutory grounds, that Section 8(b)(1)(A) did not reach organizational picketing by a union that does not represent a majority of the employees (*NLRB* v. *Drivers Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960)). As the Court noted (362 U.S. at 291), in the 1959 amendments, Congress placed some constraints on such activity, through its limitations on *picketing* in Section 8(b)(7) of the Act, 29 U.S.C. 158(b)(7). See H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 41 (1959), I Leg. Hist. 945.

poses might be prohibited without running afoul of the First Amendment as it was then understood. *House Hearings* at 1254-1255. In all of the decisions he cited to the Committee, this Court had noted the special characteristics of picketing that took it partly outside the ambit of the First Amendment.[32] A few of those cases and other decisions of this Court had suggested that a legislature's prohibition of picketing might also be justified solely on the ground that the *objective* of the picketers was unlawful. E.g., *Building Service Employees International Union* v. *Gazzam*, 339 U.S. 532, 539-540 (1950); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722, 728 (1942).[33] But it certainly does not follow from those

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[32] *Hughes* v. *Superior Court*, *supra*, 339 U.S. at 465, citing *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769, 776 (1942) (concurring opinion)) ("'[P]icketing * * * is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated'"); *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470, 474 (1950) (plurality opinion; citation omitted) ("[W]hile picketing has an ingredient of communication," the Court's "decisions reflect recognition that picketing is 'indeed a hybrid'"); *Building Service Employees International Union* v. *Gazzam*, 339 U.S. 532, 537 (1950) ("picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey"); *Local 10, United Association of Journeymen Plumbers* v. *Graham*, 345 U.S. 192, 200 (1953) (picketing of construction project is "more than * * * mere publication" of the project's nonunion character, and picketing was done "in such manner that, coupled with established union policies and traditions, it caused the union men to stop work").

[33] In *Ritters Cafe*, the picketing operated immediately to produce the result (conscription of neutrals) that was contrary to state policy because it acted as a signal to unionized employees, and the Court viewed this as an instance in which the union was bringing "the full weight of familiar weapons of industrial combat" against the employer in question. 315 U.S. at 726. *Giboney*, as its author, Justice Black, later explained in his concurring opinion in *Tree Fruits* (377 U.S. at 79), was a case in which picketers were helping

suggestions that the First Amendment imposes no limits on a legislature's power to ban noncoercive communication of a message urging others to engage in lawful action, solely on the ground that, if enough of the listeners are persuaded by the message, a result the legislature deems undesirable may occur.[34]

In any event, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Pierce*, No. 80-203 (May 3, 1982), slip op. 24 n.61, quoting *Brown* v. *GSA*, 425 U.S. 820, 828 (1976). Had Congress believed that prohibitions of speech could be rendered constitutional by the simple expedient of making an objective of the message in question unlawful—however many contingencies may exist between the utterance of the speech and the forbidden result—then it would not have been moved to include the proviso at all. The proviso privileges nonpicketing publicity for an objective (dissuading consumers from patronizing a neutral employer so as to pressure that employer to cease doing business with someone else) that *has* been declared unlawful if accomplished by picketing.

Members of Congress were aware of both the special force that picketing, in contrast to mere distribution of printed messages, can exert in the labor context and the fact that the difference between the two forms of expres-

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"carry out an unlawful or criminal undertaking." (In *Giboney* the union's "*immediate* objective was to induce [a business] to violate the Missouri [antitrust law]." 336 U.S. at 502.)

[34] Petitioner incorrectly cites (Br. 32-33) *Hughes* as authority for the proposition that a union's distribution of literature, without picketing, constitutes "coercive speech." As the complete sentence from which petitioner extracted its quotation makes clear, what the Court found to extend "beyond the aspect of mere communication as an appeal to reason" was "the compulsive features inherent in picketing" (*Hughes* v. *Superior Court*, *supra*, 339 U.S. at 468).

sion had constitutional significance.[35] Thus, it is unlikely that the words "product" and "distributed," as used in the proviso, were intended to exclude from the proviso nonpicketing publicity of the type at issue in the present case, rendering it subject to the strictures of Section 8(b)(4)(ii)(B) of the Act. As the Court observed in *Servette* (377 U.S. at 55): "There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception * * *."[36] That history

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[35] Quite apart from any constitutional significance, we note that Congress may have considered advertising and the distribution of handbills simply less troublesome than picketing, even in the secondary boycott context. Indeed, after the conference agreement was reached, Senator Morse complained about the constraints on picketing and dismissed the significance of the proviso because it was unlikely to effectuate what he conceived as legitimate union interests in enlisting the aid of the public in labor disputes. 105 Cong. Rec. 17883 (1959), II Leg. Hist. 1427. He argued (*ibid.*):

> It is not enough to say that the union can make its appeal by newspaper advertisements and leaflet distribution. Advertisements are expensive, and both may be ineffective to quickly and dramatically catch the public's eye.

It is also noteworthy that a law review article concerning secondary activity at shopping centers under the Act as it existed prior to the 1959 amendments warned against adverse effects of union activities on shopping mall tenants not concerned in the particular labor dispute in question, but suggested that consumer response was mainly a reaction to picketing, since "[c]ustomers would be reluctant to patronize stores in the vicinty of the picket signs." Note, *Shopping Centers and Labor Relations Law*, 10 Stan. L. Rev. 694, 703 (1958). The article does not mention leaflet distribution as a special problem. See also *NLRB* v. *Retail Store Employees, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) ("no doubt the principal reason why handbills are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea."); Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 Va. L. Rev. 189, 210 n.76 (1966).

[36] Soon after the enactment of the 1959 amendments, several commentators identified the difference between picketing and other forms of expressive activity as the essential constitutional distinc-

provides ample warrant for the conclusion that the references in the proviso to products and distribution are simply reflections of the most familiar factual pattern for secondary consumer boycotts, and were not intended as "words of special limitation" (*International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901 (1961)). While the Board has looked to determine whether the employer to whose customers the union directs its appeal can be said to distribute any product of the primary employer, the Board has never lost sight of the "basic purpose of the proviso" (*Servette, supra*, 377 U.S. at 55) and, accordingly, it has consistently construed the product and distribution language broadly.[37]

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tion that underlay the inclusion of the proviso, and some even saw possible constitutional difficulties in prohibiting nonpicketing publicity where it has an effect of inducing employee refusals to pick up or deliver goods or to perform services. Farmer, *The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions*, 48 Geo. L.J. 327, 341 (1959); Fisher, *Constitutional Questions Under the New Act*, 48 Geo. L.J. 209, 223-225 (1959); Fleming, *Title VII: The Taft-Hartley Amendments*, 54 Nw. U. L. Rev. 666, 692-693 (1960).

[37] See *Lohman Sales Co., supra*, 132 N.L.R.B. at 906-908; *Plumbers & Pipefitters Local 142 (William Matera and Piggly Wiggly)*, 133 N.L.R.B. 307, 308, 315-319 (1961); *Local 662, Radio & Television Engineers, affiliated with International Brotherhood of Electrical Workers (Middle South Broadcasting)*, 133 N.L.R.B. 1698, 1705 (1961); *American Federation of Television & Radio Artists, Local 55 (Great Western Broadcasting Corporation)*, 134 N.L.R.B. 1617, 1621 (1961); *International Brotherhood of Electrical Workers, Local 712 (Golden Dawn Foods)*, 134 N.L.R.B. 812, 815-816 (1961); *Electrical Workers Local 73 (Northwestern Construction of Washington, Inc.)*, 134 N.L.R.B. 498, 499-501 (1961); *Local 154, International Typograhical Union (Ypsilanti Press, Inc.)*, 135 N.L.R.B. 991, 992, 995-998 (1962); *United Plant Guard Workers (Houston Armored Car Co.)*, 136 N.L.R.B. 110, 111, 113-114 (1962); *Local 54, Sheet Metal Workers International Association (Sakowitz, Inc.)*, 174 N.L.R.B. 362 (1969); *United Steelworkers (Pet, Inc.)*, 244

B. The Message of the Union's Handbills is Within the Protection of the Publicity Proviso

Petitioner does not dispute that the Union "could have lawfully handbilled to urge a consumer boycott of Wilson's" (Br. 20), since Wilson's was directly responsible for engaging a construction contractor whose wage and fringe benefit levels, in the Union's view, undermined area standards that the Union had sought to establish for construction employees. Petitioner therefore does not disagree that the store produced by High is a "product," and Wilson's, which was to operate that store as a retail business operation, is a "distributor" of the store within the meaning of the publicity proviso.[38]

Petitioner contends (Br. 20-28), however, that the Board erred in finding that High's product was also produced for and distributed by petitioner, the owner of the mall property who shared in all of the tenants' profits, and the tenants other than Wilson's whose fortunes were linked with petitioner and each other as part of the mall enterprise. Petitioner urges, instead, a reading of the

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N.L.R.B. 96, 100-102 (1979), rev'd and remanded, 641 F.2d 545 (8th Cir. 1981).

[38] Petitioner must concede at least this much. Otherwise most handbilling of neutrals performed on behalf of employees in the construction industry would be outside the scope of the proviso, since a high proportion of construction industry "products" are buildings and are "distributed" only in the sense of being used for commercial purposes. As this Court observed in *Servette* (377 U.S. at 55), in rejecting the contention that a mere wholesale distributor could not be considered a "producer" of products, it would be "incongruous" to read the proviso so narrowly as to exclude handbilling by unions such as the Teamsters—a primary target of the 1959 legislation, which represented employees of motor carriers—who offer a service and do not "produce" products in the narrow sense of those terms. Similarly, here, it would be "incongruous" to read the proviso so narrowly as to exclude handbilling by unions in the construction industry.

publicity proviso that would deny the Union the freedom to advise the public that petitioner had abandoned its policy of including in its tenants' leases terms assuring that construction on petitioner's property would not undermine the Union's wage standards.[39] Petitioner would also exclude from the protection of the proviso the Union's attempt to bring pressure against petitioner by urging the public not to patronize the mall stores, which shared their profits with petitioner through the rent formula, until petitioner announced that it would take steps to insure that construction taking place on its property in the future—under the terms of the leases it chose to negotiate—would not undermine the Union's standards.

Contrary to petitioner's contentions, the Board did not disregard the producer/distributor language of the publicity proviso in finding that the Union's message came within the proviso. Rather, as it has for the past two decades, the Board has considered the facts of each case and applied the proviso in the light cast by its legislative history and basic purpose.[40] The Board's approach is reasonable for, as this Court has cautioned, "insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments." *Local Lodge 1424, Machinists* v. *NLRB*, 362 U.S. 411, 417 n.7 (1960).

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[39] Under the standard leases signed by tenants other than Wilson's, construction was to be performed by union labor (A. 35a, 62a). The handbills did not, however, demand a return to that policy, merely urging the public not to shop at the mall stores until petitioner ("the Mall's owner") promised "that all construction at the mall will be done using contractors who pay their employees fair wages and fringe benefits" (A. 84a-85a).

[40] Indeed, for the most part, petitioner apparently accepts the principles established in the Board's decisions since 1959 and this Court's decision in *Servette* (Pet. Br. 18-21). The only decision of the Board, aside from the one at issue here, with which petitioner expresses disagreement (Pet. Br. 22) is *United Steelworkers (Pet, Inc.)*, 244 N.L.R.B. 96 (1979), rev'd and remanded, 641 F.2d 545 (8th Cir. 1981).

1. *The development of Board law concerning the proviso*

Shortly after the 1959 Amendments were enacted, the Board decided *International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901 (1961), a decision expressly approved in *Servette* (377 U.S. at 55). The Board rejected the contention that a wholesale distributor was not a "producer" of goods within the meaning of the proviso, because it merely handled the goods in question. The Board reasoned (132 N.L.R.B. at 906-907) that, under various generally accepted definitions, "producer" could refer to anyone who added "labor in the form of capital, enterprise, and service" to some end product, and that any more restrictive construction of the proviso would "attach a special importance to one form of labor over another" and exclude large segments of the working population from the proviso's protection for truthful dissemination of messages regarding labor disputes.

The Board observed that "there is no suggestion either in the statute itself or in the legislative history that Congress intended the words 'product' and 'produced' to be words of special limitation" (132 N.L.R.B. at 908) and that, "[w]hile it is true that the legislative history gives the familiar example of 'one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute,' this is hardly an indication that no other producer is covered by the proviso" (*id.* at 908, quoting 105 Cong. Rec. 17898-17899 (1959), II Leg. Hist. 1432 (footnote omitted)). The Board refused to attribute to Congress any "arbitrary and purposeless distinction" between manufacturers of goods and firms, such as Lohman, which acted as wholesalers (132 N.L.R.B. at 908).[41]

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[41] The Board also rejected a contention that the union's handbilling fell outside the proviso because the publicity was untruthful insofar as the handbills distributed near the stores of one of the targeted secondary employers (Furrs) could be read as suggesting that Furrs purchased candies and cigars, as well as cigarettes,

In the same vein, the Board subsequently rejected a contention that a radio station was not a producer of the products it advertised, and accordingly held that a union representing the station's employees could disseminate literature asking the public to refrain from patronizing a business that placed advertisements on the station. *Local 662, Radio & Television Engineers (Middle South Broadcasting Co.)*, 133 N.L.R.B. 1698 (1961). In any literal sense, no product of the station could be said to be distributed by those businesses. The product of the station was simply the commercial advantage that its advertising effected. Nonetheless (133 N.L.R.B. at 1705):

> [T]he Board held in [*Lohman*] that a primary employer wholesaler, by adding his labor in the form

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from Lohman Sales, the primary employer (132 N.L.R.B. at 905-906). The Board concluded that the publicity was "substantially accurate" and noted that the union had changed the handbills to focus on the cigarettes as soon as Furrs gave it the correct information (*id.* at 906). As the Board further explained (*ibid.*): "[T]he proviso does not require that a handbiller be an insurer that the content of the handbill is 100 percent correct, and * * * where, as here, there is no evidence of an intent to deceive and there has not been a substantial departure from fact, the requirements of the proviso are met." In this Court, petitioner does not challenge the truthfulness of the handbills distributed by the Union. Br. 11. n.10.

The Board, however, does not hesitate to find a violation of Section 8(b)(4) of the Act when handbills contain significant inaccuracies, such as false suggestions that the union's primary dispute is with the handbilled neutral employer (*Local 732, International Brotherhood of Teamsters (Servair Maintenance, Inc. & National Airlines, Inc.)*, 229 N.L.R.B. 392, 402 (1977)), false implications respecting what aspect of the neutral employer's enterprise is related to the primary employer (*National Association of Broadcast Employees & Technicians Local 31 (CBS, Inc.)*, 237 N.L.R.B. 1370, 1376 (1978), enf'd on other grounds, 631 F.2d 944 (D.C. Cir. 1980)), or false suggestions that some other complaint the union had against the leafleted employer was related to the primary dispute (*Service Employees Local 399 (Delta Air Lines, Inc)*, 263 N.L.R.B. No. 153, 111 L.R.R.M. (BNA) 1159, 1161-1162 (Sept. 10, 1982). See also *Hoffman* v. *Cement Masons Local 337*, 468 F.2d 1187, 1191 (9th Cir. 1972), enforcing 190 N.L.R.B. 261 (1971), cert. denied, 411 U.S. 986 (1973)).

> of capital, enterprise, and service to a product manufactured by someone else, became one of the producers of that product. Similarly here, the primary employer radio station, by adding its labor in the form of capital, enterprise and service to the automobiles which it advertises for the secondary employer retail distributor of the automobiles, becomes one of the producers of the automobiles.

Following *Middle South*, the Board held that a union could distribute handbills urging consumers to boycott retailers who advertised on a television station with which the union was involved in a primary labor dispute, but the Ninth Circuit declined to enforce the order. *American Federation of Telcvision & Radio Artists, Local 55 (Great Western Broadcasting Corp.)*, 134 N.L.R.B. 1617 (1961), rev'd and remanded, 310 F.2d 591 (1962). After this Court's decision in *Servette*, however, the Ninth Circuit reversed its earlier holding. *Great Western Broadcasting Corp.* v. *NLRB*, 356 F.2d 434 (1966), cert. denied, 384 U.S. 1002 (1966). As the court explained (356 F.2d at 436-437):

> [T]he Supreme Court has spoken in such broad terms in *Servette*, that we think the incongruity to which we referred [reading "product" as including services] may not control the ultimate decision. The Supreme Court appears to place prime reliance upon the legislative history, and nothing has been called to our attention which indicates that Congress intended to differentiate between primary employers engaged in the production of tangible products and those involved in rendering services.
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> * * * * *
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> The Supreme Court has said that the publicity proviso is to be given as broad an application as the statutory prohibition. It follows that, whatever difficulties an analytical dissecting of the proviso may reveal, they are not to stand in the way of giving that proviso a scope commensurate with the section to which it is appended.

Applying the principles announced in *Lohman Sales* and elaborated in *Middle South* and *Great Western*, the Board held in *Pet* that, for purposes of the proviso, a wholly owned subsidiary (Hussman) of a conglomerate enterprise (Pet) was a producer of the products of that enterprise, even though Hussmann did not sell what it manufactured (refrigeration equipment) to any arm of that enterprise. *United Steelworkers (Pet, Inc.)*, 244 N.L.R.B. 96 (1979), rev'd and remanded, 641 F.2d 545 (8th Cir. 1981). The Board reasoned (244 N.L.R.B. at 101) that, "as a result of its relationship with the diversified Pet enterprise, Hussmann applies capital, enterprise, and service to Pet and its other subsidiaries and divisions." As it further explained (*id.* at 101, 102): "Diversified corporations, by their very nature are composed of operations which provide support for and contribute to one another"; indeed, Pet's chairman had boasted that the diversification of the enterprise was vital to its strength. More specifically, the Board explained (*id.* at 102; footnotes omitted):

> Hussmann is clearly a major part of [the] Pet enterprise and as such a producer of Pet products within the terms of the proviso. Hussmann provides part of the diversification which contributes to the success of Pet and its other operations. Hussman[n]'s acclaimed high sales and earnings generate income which inures to the benefit of Pet and to Pet's effort to maintain its other subsidiaries. The goodwill earned by Hussmann likewise enhances the reputation of all Pet operations.

Accordingly, the Board concluded that the union was privileged by the publicity proviso to place newspaper advertisements and distribute handbills advising the public of its labor dispute with Hussmann and asking that members of the public aid the union in its dispute by refraining from purchasing the products of Hussmann's

corporate parent, Pet, and other businesses within Pet's conglomerate enterprise.[42]

2. *Application of the proviso to the Union's message in this case*

As set out in the statement (pages 2-5, *supra*), petitioner is the owner of the land on which High, the primary employer in the labor dispute, constructed a store using the labor of employees who, in the Union's opinion, were compensated at rates that undermine the standards that the Union has established for construction employees in the area. Once that store was constructed and put into operation, any customers drawn to the mall would be potential customers of the other stores there. That fact is reflected in the stipulation in the standard lease that the opening of any large new department store over a specified number triggers a 10% increase in the rents paid to petitioner by the other tenants (Pet. App. 22a, 23a; A. 30a). By the same token, Wilson's benefits from mall patronage attracted by the other stores and from the joint advertising campaigns conducted by the mall's merchants' association. Further, any increased customer flow benefits not only the individual stores but also petitioner, which shares in the tenants' profits under the rental provisions of its standard lease. Moreover, as the Statement shows (pages 2-3, *supra*), the profit-sharing arrangement, the joint advertising, and the mutual advantage in attracting customers to the mall are not the

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[42] A divided panel of the United States Court of Appeals for the Eighth Circuit declined to enforce the Board's order because it found the Board's construction of the word "produce" unreasonable and the "connection between Pet's products and Hussman * * * highly attenuated" (*Pet, Inc.* v. *NLRB*, *supra*, 641 F.2d at 549). The court remanded the case, so that the Board could decide other questions essential to the finding of an unfair labor practice, namely, "whether Pet and its subsidiaries are separate 'persons' from Hussman for purposes of Section 8(b)(4), and whether the Union's publicity fell within the prohibition of Section 8(b)(4)(ii)" (*id.* at 549-550).

only financial or commercial connections that link petitioner and its tenants in what is, in significant respects, a de facto joint retail merchandising enterprise.[43]

The Board and the court of appeals, therefore, reasonably concluded that, for purposes of the publicity proviso, the product—Wilson's store—is distributed not only by Wilson's in the conduct of its retail operation, but also by petitioner and all the other stores that joined efforts to draw customers to the mall (Pet. App. 8a).

The exaggerated fears expressed by petitioner (Br. 27-28) and its supporting amici (Chamber of Commerce Br. 6-9; American Retail Fed. Br. 15; Associated General Contractors Br. 11-12) that the Board's decision portends future rulings that the proviso extends to handbilling of employers with much more attenuated relations to the primary dispute than exist here provide no basis for rejecting the Board's ruling in this case. The "mutually dependent and beneficial relationships" found by the Board amount to much more than sharing a common location; the Board carefully noted the cost-sharing and profit-sharing relationships, as well as petitioner's potential control of construction work on the mall property.

Moreover, it is highly unlikely that situations resembling the examples supplied by petitioner and its amici would even arise, since a union would have little or no incentive to distribute truthful publicity explaining why

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[43] As petitioner notes (Br. 22-23 & n.32), a provision in the standard lease expressly disclaimed any intent to create a "partnership" or "joint venture" or "any association whatsoever, between Lessor and Lessee" (A. 51a). Whatever the effect of such a provision were the relevant question whether petitioner and its tenants constitute a partnership, joint venture, or joint or single employer (see *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402 (1960)), the provision clearly cannot bar the Board from taking into account undisputed connections between petitioner and its tenants for purposes of determining whether the connections are close enough to satisfy the terms of the proviso. See, e.g., *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944); *NLRB* v. *Security Guard Service, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967).

it is asking the public to withhold patronage from businesses whose relationships to the allegedly unfair employer are limited, for example, to being situated on the same block as a secondary employer that does business with the primary or sharing security arrangements with the secondary. Not only would such businesses have little leverage with respect to the matters concerned in the primary labor dispute, but the union's message to the public would simply not be very persuasive.[44]

In the present case, however, the Union truthfully advised the public that "the Mall ownership[]" had "contribut[ed] to substandard wages" (A. 84a), by changing its policy of assuring that stores not be built on its property by contractors who pay their employees at less than the union standards for the area. A holding that such a message—coupled with a request that consumers not shop at the mall until its owner announced a change in this policy—falls within the publicity proviso hardly amounts to a "total elimination of distinctions between classes of secondary employers" (Associated General Contractors Br. 12)—particularly since it seems likely that petitioner's willingness to offer Wilson's lease terms that permitted it to engage a low-wage contractor to build its store at the mall operated as an inducement for Wilson's to locate one of its retail stores at the mall, to the benefit of petitioner and all of its other tenants.[45]

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[44] Even in this case, the Union apparently had some doubts about the impact of its message, since it addressed an alternative plea to those who "MUST ENTER THE MALL TO DO BUSINESS," asking them to express to store managers their "concern over substandard wages and [their] support of [the Union's] efforts" (A. 85a).

Since the proviso only protects "truthful" publicity, a union is not free to make its message more persuasive by misrepresenting the relationships between the primary employer and businesses from which it is asking the public to withhold patronage.

[45] Petitioner's assertion (Br. 25-26) that neither it nor its tenant stores could exert any "real influence" over the "underlying labor dispute" and that they had "no control over or power to terminate

C. The Board's Construction of the Proviso Avoids a Difficult Constitutional Question

As this Court has repeatedly pointed out, when a proposed construction and application of a statute raises serious constitutional questions, prudential considerations dictate that the Court determine whether that proposed reading of the statute represents the clearly expressed will of Congress before taking upon itself the task of resolving the "difficult and sensitive" constitutional questions posed. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-501, 507 (1979). Accord, *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982), slip op. 12; *International Association of Machinists* v. *Street*, 367 U.S. 740, 749-750 (1961); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347, 348 (Brandeis, J., concurring) (1936). We have explained above that the language and legislative history of the publicity proviso in no way compel petitioner's restrictive reading of the proviso. Petitioner's reading of Section 8(b)(4), including its proviso—which would ban the Union's communication of its message to the public by means not reinforced by "the compulsive features inherent in picketing" (*Hughes* v. *Superior Court*, 339 U.S. 460, 468 (1950) (see Pet. Br. 9 n.8)—raises difficult questions respecting the First

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the source of the Union's dissatisfaction" is an overstatement. Petitioner disregards not only its own ability to request Wilson's to seek to ensure that High pay wages and benefits meeting area standards, but also its power to satisfy directly at least part of the Union's broader request that petitioner "publicly promise[] that all construction at the Mall will be done using contractors who pay their employees fair wages and benefits" (A. 84a-85a).

In seeking to encourage consumer pressure to induce petitioner to announce such a policy, the Union necessarily urged consumers to withhold patronage from the mall stores, because of the arrangement for petitioner to participate in profits generated by consumer purchases at those stores.

Amendment guarantee that "Congress shall make no law * * * abridging the freedom of speech." [46]

When Congress considered expanded secondary boycott restrictions in 1959, it was cognizant of a line of cases suggesting "that picketing, not being the equivalent of speech as a matter of fact, is not its legal equivalent" (*Hughes* v. *Superior Court*, *supra*, 339 U.S. at 465). See pages 27-28 & note 32, *supra*.[47] The distinction noted

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[46] The Board has not directly confronted the constitutional question in this sensitive area. As it noted in *United Steelworkers (Pet, Inc.)*, *supra*, 244 N.L.R.B. at 102 n.33, if the publicity proviso exempts a particular instance of union publicity from the prohibition of Section 8(b)(4) of the Act, it is unnecessary to consider whether such publicity also "is protected by the free speech provision of the Constitution." Nonetheless, it is entirely appropriate for this Court to be mindful of potential First Amendment difficulties in construing the publicity proviso in this case. Cf. *NLRB* v. *Catholic Bishop*, *supra*. In urging such an approach, we do not seek to substitute "Board counsel's rationale for that of the Board" (Pet. App. 13a n.6), but merely argue for the application of the same prudential considerations that the Board took note of in *Pet*, the decision that it followed in this case. Indeed, at an earlier stage of the *Pet* case itself, before the Board had spoken, counsel for the Board argued in this Court, in opposing certiorari to review the issuance of an interim Section 10(*l*) injunction (28 U.S.C. 160(*l*)), that First Amendment rights were not infringed. *United Steelworkers* v. *Solien*, cert. denied, 444 U.S. 828 (1979) (Br. in Opp. No. 78-1634, 1979 Term).

[47] These cases represented, in the main, a narrowing of the broad language of *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940), in which the Court struck down an Alabama statute that, inter alia, prohibited loitering about a lawful place of business to induce people not to trade there and picketing with the intent to injure a place of business; in doing so, the Court explained (310 U.S. at 103) that a state's power "to set the limits of permissible contest open to industrial combatants" does not license it, "in dealing with the evils arising from industrial disputes [to] impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." See *International Brotherhood of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 289 (1957); Note, *Political Boycott Activity and the First Amendment*, 91 Harv. L. Rev. 659, 663-671 (1978). Nonetheless *Thornhill* has remained a viable prece-

in those cases between picketing and other means of communicating a message is a distinction to which the Court has consistently adhered. *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 311 n.17 (1979); *NLRB* v. *Retail Store Employees, Local 1001*, 447 U.S. 607, 618-619 (1980) (Stevens, J., concurring); *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215, 229-231 (1974).[48] Because of the continuing vitality of that dis-

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dent. *NAACP* v. *Claiborne Hardware Co.*, No. 81-202 (July 2, 1982), slip op. 22-23; *Chauffeurs Local 795* v. *Newell*, 356 U.S. 341 (1958); *International Brotherhood of Teamsters* v. *Vogt*, *supra*.

[48] Petitioner incorrectly relies (Br. 33) on *Amalgamated Food Employees, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 315-316 (1968), for the proposition that handbilling and picketing may be treated alike in any First Amendment analysis because both involve conduct other than speech. In *Logan Valley*, the Court observed (*id.* at 315) that a distinction between handbilling and picketing was "immaterial so far as the question is solely one of right of access [to privately owned property] for the purpose of expression of views." As the Court reasoned (*id.* at 315-316), handbilling involved "conduct other than speech, namely, the physical presence of the person distributing leaflets," and in the case of both picketing and handbilling the "manner in which" such activity was carried out could be regulated (e.g., the use of "numerous persons milling around"); the Court concluded (*id.* at 316) that it made little sense to recognize "traditional concepts of property law" as a bar to picketers, but not to handbillers.

In the present case, however, petitioner does not urge its construction of the proviso as a means of regulating the "manner" of communicating a particular message. Petitioner seeks to construe the proviso as barring the Union's message altogether; thus, under petitioner's proposed construction, the message would be unlawful whether disseminated through handbills, newspaper advertising, or union newsletters. (The letter sent by petitioner's counsel to the Union on December 20, 1979 (A. 87a-88a) offered petitioner's permission for the Union to distribute handbills at the mall in the immediate vicinity of the Wilson's construction site or on public roads leading to the mall only if the *language* of the handbill were changed.) Furthermore, petitioner's attempt to equate picketing with publicity *other than* picketing for First Amendment purposes in any labor boycott case simply disregards the decisions of this

tinction and because of additional complexities introduced into First Amendment analysis since 1959, the constitutional problem raised by construing Section 8(b)(4) of the Act to prohibit the Union's message to consumers in this case is much more difficult than petitioner suggests (Br. 28-33).

In the secondary boycott cases cited by petitioner (Br. 29), either picketing or work stoppages were involved, so the Court was not faced with the issue that would be posed by accepting petitioner's construction of the publicity proviso in this case: whether the First Amendment permits a congressional prohibition directed solely at the content of a message that is communicated noncoercively to members of the public, that elicits no unlawful agreement or conduct, and that affects a secondary employer only if members of the public are persuaded of the merits of the union's case.[49] Even if it is assumed that the constitu-

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Court cited in the text, which acknowledge important differences between the two forms of communicating facts about a labor dispute.

[49] In *International Longshoremen's Association* v. *Allied International, Inc.*, No. 80-1663 (Apr. 20, 1982), the prohibition at issue was directed not at the dissemination of a message to the public but at a refusal by union members to unload certain types of cargo (slip op. 1), and the Court noted (*id.* at 13) that, in calling the work stoppages, the union was marshalling "the considerable powers derived by its locals and itself under the federal labor laws." Unions can exert no such powers over the general public, however, and must depend on the persuasiveness of their communication in order to affect the business of a secondary employer in this context. Compare *Allied International, supra*, slip op. 13-14 & n.26.

Despite petitioner's repeated references to "coercive speech" (Br. 30, 32, 33), there is no claim in this case that the Union's distribution of handbills to those willing to accept them operated to coerce the members of the public to whom the message was addressed. Communications likely to coerce the listener, like any threat, may, of course, constitutionally be prohibited. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 Yale L.J. 938, 952-953 (1982). See also Com-

tional rule barring content-based regulations of speech is not fully applicable in the labor context,[50] potential problems abound.

For example, an analysis of petitioner's proposed construction of Section 8(b)(4) of the Act under the constitutional rule applied in *United States* v. *O'Brien*, 391 U.S. 367 (1968)—which petitioner suggests (Br. 30, 33) is the applicable test—does not clearly demonstrate the constitutionality of construing and applying Section 8(b)(4) as petitioner urges. In *O'Brien*, the Court upheld the constitutionality of a law prohibiting the destruction of draft cards ("Selective Service registration certificates"), and accordingly affirmed the conviction of a man who publicly burned his card in order "to influence others to adopt his antiwar beliefs" (391 U.S. at 370). As the Court noted (*id.* at 376), "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The Court found a substantial governmental interest in seeing that "issued certificates" are preserved in order to make possible the efficient operation of the Selective Service system (*id.* at 377-381). The Court could perceive no narrower means of assuring this end (*id.* at 381), and it noted (*id.* at 381-382) that both the governmental interest and the prohibition were limited entirely to the "noncommunicative aspect of O'Brien's conduct." The prohibition was thus in no way aimed at suppressing communication, and the effect on O'Brien's ability to communicate his views to the public was both minimal and incidental.

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ment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 Cornell L.Q. 724, 735 & n.57 (1960), citing Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 Va. L. Rev. 1023, 1047-1051 (1953).

[50] Compare, e.g., *Police Department* v. *Mosley*, 408 U.S. 92, 95, 96, 99 (1972); *Carey* v. *Brown*, 447 U.S. 455, 460-461 (1980). See *NLRB* v. *Retail Store Employees, Local 1001, supra*, 447 U.S. at 617 (Blackmun, J., concurring).

O'Brien would be analogous to the present case only if the conviction at issue were *not* for performing a nonverbal act—burning the draft card—but rather for communicating a message to the public that might ultimately have some adverse effect on the Selective Service System, even though the acts urged on members of the public were entirely lawful in themselves.[51] *O'Brien* obviously sheds little light on this more difficult question of suppressing communication because, if persuasive, it would induce members of the public to engage in lawful acts having an effect that Congress has a substantial interest in preventing, namely, a neutral employer's coerced participation in an industrial dispute. Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976) ("What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.")

Moreover, if, as petitioner also suggests (Br. 30), this Court's recent commercial speech decisions state the applicable test,[52] other problems appear. In *Central Hudson*

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[51] Indeed, the Court distinguished *Stromberg* v. *California*, 283 U.S. 359 (1931), on the ground that "the statute there was aimed at suppressing communication [and therefore] it could not be sustained as a regulation of noncommunicative conduct." *United States* v. *O'Brien*, *supra*, 391 U.S. at 382.

[52] The Union's message did not merely "propos[e] a commercial transaction"—one of the definitions the Court has given for "commercial speech." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 562 (1980), quoting *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978); 447 U.S. at 580 (Stevens, J., concurring); Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 239 (1982). However, the Court has also suggested that any speech "related solely to the economic interests of the speaker and its audience" is within the definition (*Central Hudson Gas*, *supra*, 447 U.S. at 561; 436 U.S. at 479-580 (Stevens, J., concurring)); and that regulation of speech related to certain secondary boycotts and picketing by labor unions is a form of "economic regulation." *NAACP* v. *Claiborne*

Gas & Electric Corp v. *Public Service Commission*, 447 U.S. 557, 566 (1980), the Court sets forth the following four-step analysis for determining whether governmental regulation of commercial speech passes muster under the First Amendment:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The message in the present case does not concern unlawful activity; no one contends that consumers violate any law by withholding patronage. As already noted, the truthfulness of the Union's message is not disputed in this Court. Thus, the Court would have to decide whether the government's substantial interest in prohibiting secondary boycotts so that neutral employers may "remain free from coerced participation in industrial strife" (*NAACP* v. *Claiborne Hardware Co.*, *supra*, slip op. 26) is adequately served by prohibiting *picketing* aimed at inducing consumers to withhold their patronage from neutral employers, and prohibiting "publicity other than picketing" that is untruthful or that induces employees of neutral employers to engage in work stoppages. Put another way, the question is whether a prohibition of union speech is "more extensive than necessary" to serve the relevant governmental interest when it makes unlaw-

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Hardware Co., No. 81-202 (July 2, 1982), slip op. 24-26. Here the communication reflected the economic interests of the Union's membership, but the public's response was more likely dependent on any sympathy it might have with the Union's aims, rather than on its own economic self-interest. By contrast, when a union mobilizes its own membership or other unionized employees, the interests of speaker and audience have a clearer economic nexus.

ful *all* communications by a union asking consumers to support it in a labor dispute by withholding their patronage from certain businesses, where the link between those businesses and the employer directly involved in the labor dispute is not equivalent to a "unity of interest" as defined in *Goldfinger* v. *Feintuch*, 276 N.Y. 281, 11 N.E.2d 910 (1937) (see pages 22-23 note 26, *supra*).

In light of the difficulty of these constitutional questions, and since, as we have shown, Congress has not plainly evinced an intent to prohibit the kind of union communication with the public involved in this case, the Court should avoid the constitutional questions by upholding the Board's decision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Respondent's Brief

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No. 81-1985

IN THE

Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD,

and

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO

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QUESTIONS PRESENTED

1. Did the National Labor Relations Board correctly decide, in light of § 8(b)(4) of the National Labor Relations Act, as amended, and its publicity proviso, that the union's handbilling in this case is lawful?

2. If the union's handbilling is prohibited by § 8(b)(4) does that provision to that extent violate the First Amendment?

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BRIEF FOR THE RESPONDENT FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO

The opinions below, the basis of this Court's jurisdiction herein, the constitutional and statutory provisions involved, the stipulated facts and the proceedings below are fully and fairly set out in the brief of the respondent National Labor Relations Board. So as not to burden the Court we rely on the Board's presentation in these regards and incorporate by reference in our brief those portions of the Board's brief. For the Court's convenience we do include in this brief the handbill whose publication petitioner seeks to prohibit, *infra* pp. 1a-2a.

SUMMARY OF ARGUMENT

I. In *Labor Board* v. *Servette*, 377 U.S. 46, this Court construed the publicity proviso to § 8(b)(4) as follows:

> There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress. [*Id.* at 55.]

Petitioner would dismiss this interpretation of the proviso as *dictum* because in the ensuing paragraph of the *Servette* opinion the Court explained that the same result followed there from a literal reading of the language of the proviso. (*Id.* at 55-56.) But where an opinion of the Court supports a result on alternative grounds, both constitute holdings. (*Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537.) *Dictum* is language in an opinion which reaches beyond the issues presented by the case. (See, *e.g.*, *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 399-400.) Since *Servette* squarely presented the question of the meaning of the publicity proviso, the paragraph of the opinion which petitioner would avoid is not *dictum*, but holding. Indeed, the determination that the publicity proviso is as broad as § 8(b)(4)'s prohibition was reiterated in the companion case of *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 70 (*Tree Fruits*): "The proviso indicates * * * that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, * * *."

This construction of the proviso was based on the Court's close examination of the legislative history. As stated in *Servette*, the "proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded." (377 U.S. at 55.) The compromise struck in the conference on the differing House and Senate labor

reform bills was to exclude from the prohibition of § 8(b)(4) all publicity other than picketing. As Senator Kennedy explained, the Senate conferees were "able to persuade" the House conferees

> "to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at a secondary shop . . . and can carry on all publicity short of having ambulatory picketing . . . ." [*Id.* at 70]

The compromise was thus directly responsive to the concern expressed by the Senate majority as to the protection of speech. Senator Humphrey drew the Senate's attention to a very recent case which had held that nonpicketing publicity is constitutionally protected. (*NLRB* v. *International Ass'n of Machinists, Etc.*, 263 F.2d 796 (C.A. 9) (Feb. 4, 1959).) And, the distinction for First Amendment purposes between picketing and other publicity is one which had been marked out in many decisions of this Court which were summarized in *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284, 289-293 (1957). Against this background "it would fall far short of achieving [the proviso's] basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor." (*Servette*, 377 U.S. at 55.) And, no proponent of the bill stated that the proviso was to be given that narrow scope. Nor is there any indication that close attention was given in framing the proviso to the general terms used therein on which petitioner seizes and which petitioner would read to defeat Congress' evident intent.

The conclusion that, with respect to publicity other than picketing, the proviso to 8(b)(4) is as broad as the prohibition is compelled also if construction is guided, as it must be, by the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may

be avoided." *United States* v. *Security Industrial Bank*, —— U.S. ——, 51 L.W. 4007, 4009 (Nov. 30, 1982), quoting prior cases. This "principle of wisdom and duty" (*United States* v. *Rumely*, 345 U.S. 41, 47) has special force where serious questions are raised under the First Amendment. This consideration was dispositive in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, where the Court said:

> The values enshrined in the First Amendment plainly rank high "in the scale of our national values." In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction. [440 U.S. at 501]

It is impossible to "identify" an "affirmative intention of Congress clearly expressed" to outlaw publicity other than secondary picketing where the economic relationship of the parties does not fit within the literal terms of the proviso narrowly read. *Catholic Bishop* teaches additionally that the Court must take special pains to avoid a construction which would raise First Amendment doubts where, in the words of *United States* v. *CIO*, 335 U.S. 106, 120, "it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment." (See also *Catholic Bishop*, 440 U.S. at 506.) Here, the legislative history unmistakably reflects strong concern with the preservation of First Amendment values. Petitioner's proposed narrowing of the proviso cannot be reconciled with these teachings, and petitioner does not even attempt to do so.

II. The First Amendment does not tolerate an absolute ban—backed by the sanctions of the temporary injunction,

the permanent injunction and damages—on *non-picketing* publicity by unions criticizing a business practice followed by certain persons—and asking members of the general public not to patronize those who engage in that practice. (*Organization For A Better Austin* v. *Keefe*, 402 U.S. 415.)

The Court there invalidated an injunction against the distribution of leaflets that criticized the activities of a real estate agent. The Court ruled, in terms that are equally decisive here: "The claims that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. * * * No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." (*Id.* at 418, 420.) The latter point was recently reaffirmed in *NAACP* v. *Claiborne Hardware Co.*, 50 L.W. 5122, 5128: "Speech does not lose its protected character * * * simply because it may embarrass others or coerce them into action."

Petitioner fails even to cite *Organization For A Better Austin*, and the decisions on which petitioner does rely in no way affect its precedential force for the purpose of this case. The decisions on which petitioner relies have permitted closer regulation where "speech" and "nonspeech" elements are combined in the same course of conduct. This principle of First Amendment analysis, elaborated in *United States* v. *O'Brien*, 391 U.S. 367, is a basic underpining of the decisions which have distinguished for constitutional purposes between picketing and other forms of publicity—decisions to which Congress was advertent in enacting the publicity proviso. (See, *e.g.*, *Giboney* v. *Empire Storage Co.*, 336 U.S. 490; *Hughes* v. *Superior Court*, 339 U.S. 460 and *NLRB* v. *Retail Store Employees*, 447 U.S. 607. (In the last of these, each of the opinions for the majority confines its constitutional analysis to "picketing" and the concurring opinion of Justice Stevens ex-

pressly stresses the difference between picketing and other forms of speech).) The nonspeech element of a union order or signal directed to its members to engage in conduct—a work stoppage—contrary to a valid law and backed by union discipline was also present in *Giboney, supra*, as well as in *Electrical Workers* v. *Labor Board*, 341 U.S 694, and in *Longshoremen* v. *Allied International*, 50 L.W. 4402.

Here, there is no nonspeech element that justifies government regulation. For, handbilling, as Justice Stevens noted in *Retail Store Employees*, "depend[s] entirely on the persuasive force of the idea" stated therein and hence in contrast to picketing is not subject to regulation on the ground that the "effort to communicate * * * calls for an automatic response to a signal rather than a reasoned response to an idea" (447 U.S. at 619). (See, also, *e.g.*, *Lovell* v. *Griffin*, 303 U.S. 44.) Finally, the message of the Union's handbill is at the heart of the First Amendment's protections. As stated in *Organization For A Better Austin* (402 U.S. at 419): "Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of newspapers. *See Schneider* v. *State*, *supra*; *Thornhill* v. *Alabama*, 310 U.S. 88 (1940)." The most basic point of *Thornhill*—that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution" (310 U.S. at 102)—has stood the test of time. So, too, has the conclusion of that case that answers petitioner's argument that such speech is mere economic activity: "The group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." (310 U.S. at 105.) (See *Claiborne*, 50 L.W. at 5128.)

ARGUMENT

I. The Scope Of The "Publicity Proviso" To § 8(b)(4) Of The National Labor Relations Act, As Amended, Is No Narrower Than The Prohibition To Which That Proviso Is An Exception

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a union:

> "(ii) to threaten coerce, or restrain any person * * * where * * * an object thereof is—
>
> * * * *
>
> "(B) forcing or requiring any person to cease * * * dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *
>
> * * * *
>
> *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *."

The court of appeals' opinion below succinctly explains the National Labor Relations Board's approach to the proper construction of § 8(b)(4)'s publicity proviso:

> In its leading decision *Lohman Sales*, the Board concluded that a wholesale distributor of cigarettes and other commodities—a middleman—was a producer of those goods within the meaning of the proviso because it added the value of its labor to these goods in the form of capital, enterprise, and service. In reaching that conclusion, the Board reviewed the legislative history of the proviso and decided that the words "product" and 'produced" were not meant to be

words of special limitation. Rather, it concluded that labor is the key characteristic of one who produces and, accordingly, that the Board need not attempt "to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled." 132 N.L.R.B. [901] at 907. *See Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 N.L.R.B. 1698 (1961) (radio station is producer of products it advertises).

* * * *

In no area has a generous interpretation of the language been more necessary than in the construction industry, as a construction company obviously does not produce tangible goods that are then literally distributed by a secondary employer. The Board has, accordingly, given liberal interpretation to the proviso in this context and has consistently held that construction contrators and subcontractors are producers within the meaning of the proviso and that their services are products, * * * and that they are also producers of the "end product" to which their services contribute.

* * * *

As labor cases involving shopping center construction arose, the Board continued to give broad definition to the producer-distributor language of the proviso. In *Local Union No. 54, Sheet Metal Workers (Sakowitz, Inc.)*, 174 N.L.R.B. 362 (1969), the Board held that a union's handbilling of certain downtown stores was protected under the proviso. * * * In these shopping center cases it can be inferred that the construction contractors and subcontractors were producers of a certain work product and that the shopping center's stores were distributors of that product and thus could be handbilled by union urg-

> ing a total boycott of their businesses. [662 F.2d at 269-271.]

The brunt of petitioner's response is that "the producer-distributor restriction constitute[s] words of special limitation which must be given effect." (Pet. Br. 7.) In the argument that follows, we demonstrate that petitioner's assertion is squarely contrary to this Court's primary holding in *Labor Board* v. *Servette*, 377 U.S. 46, and to the 1959 Congress' intent in amending § 8(b)(4) as correctly stated in that holding.

1. In *Servette* the Court answered in the affirmative "the question whether the proviso to amended § 8(b)(4) protected the Local's handbilling" (377 U.S. at 54) which "request[ed] that you [members of the general public] not buy the following products distributed by Servette, Inc. * * * [because] Servette * * * refuses to negotiate with the [Local] that represents its drivers" (*id.* at 48, quoting the Local's handbill). The Court stated its primary holding as to the meaning of the proviso as follows:

> The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. We elaborated the history of the proviso in *Labor Board* v. *Fruit & Vegetable Packers, Local 760*, [see *infra* pp. 15-16, 21-22]. It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. Moreover, a primary target of the 1959 amendments was the secondary boycotts conducted by the Teamsters Union, which ordinarily represents employees not of manufacturers, but of motor carriers. There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress. [377 U.S. at 55; footnotes omitted.]

In the companion case to *Servette* decided the same day, *Labor Board* v. *Fruit Packers*, 377 U.S. 58 (*Tree Fruits*), the Court reiterated that holding in the following terms:

> The proviso indicates * * * that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, but not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work. On the other hand, picketing which persuades the customers of a secondary employer to stop all trading with him was also to be barred. [377 U.S. at 70-71.]

It is our position here that *Servette*'s basic holding—that "nothing * * * suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception"—is entirely sound and is dispositive here. With regard to union activity to advise members of the general public that A has an economic relationship with B (with whom the union has a labor dispute) and to ask those consumers on that account not to patronize A, § 8(b)(4)(ii) is "directed", this Court reiterated in *NLRB* v. *Retail Store Employees*, 447 U.S. 607, "to an 'isolated evil' [—] use of secondary picketing 'to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer.'" (*Id.* at 612 quoting *Tree Fruits*, 377 U.S. at 63.) That evil, said the *Retail Store Employees* Court, includes "secondary picketing" that is "reasonably calculated to induce customers not to patronize the neutral parties at all." (447 U.S. at 614.) But the 1959 Congress did *not* regard non-picketing "do not patronize" publicity to be an evil. The office of the proviso is to make manifest Congress' intent that after the Landrum-Griffin amendments to § 8(b)(4), as before, such publicity would be entirely lawful.

2. Immediately after the portion of its opinion quoted *supra* p. 9 the *Servette* Court added:

> The term "produced" in other labor laws was not unfamiliar to Congress. Under the Fair Labor Standards Act, the term is defined as "produced, manufactured, mined, handled, or in any other manner worked on . . .," 29 U.S.C. § 203(j), and has always been held to apply to the wholesale distribution of goods. The term "production" in the War Labor Disputes Act has been similarly applied to a general retail department and mailorder business. [377 U.S. at 55-56; footnote omitted.]

Recognizing that the passage we have labelled *Servette*'s "primary holding" is controlling against its contention petitioner would dismiss that portion of the decision as "*dicta*" (Pet. Br. 19). Petitioner bases this characterization entirely on the discussion in the ensuing paragraph of *Servette* just set out in relevant part. But the latter paragraph does not purport to withdraw from the Court's broad construction of the proviso in the preceding paragraph. We have, thus, a situation familiar in this Court's jurisprudence, two alternative grounds for a single decision. And, it has long been understood that:

> [W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*. *United States* v. *Title Ins. Co.*, 265 U.S. 472, 486; *Massachusetts* v. *United States*, 333 U.S. 611, 623. [*Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537.] [1]

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[1] In the *Title Insurance* case cited in *Woods*, Justice Van Devanter elaborated:

> [I]t is urged that what we have described as ruled there was *obiter dictum* and should be disregarded, because the Court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. The premise of the contention is right but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, "the ruling

The nature of *dictum*, by contrast, was explained by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 399-400:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

It cannot fairly be said that the question whether the publicity proviso is as broad as the prohibition went "beyond the case" in *Servette*, or was not "investigated with care and considered in its full extent."

While we need not justify this Court's frequently reiterated practice, petitioner's argument illustrates why a different course would be unworkable. For petitioner does not explain why, other than its own preference, the first paragraph of *Servette's* discussion of the proviso, rather than the second, is to be relegated to the status of *dictum*. The same problem would arise in any case in which alternative holdings are advanced for a decision. Under petitioner's approach a reasoned explanation of a result which covers a large set of cases would be undermined if that explanation were buttressed by additional reasoning which would resolve (on petitioner's view of the matter here) a smaller set of cases. Thus, the precedential

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on neither is *obiter*, but each is the judgment of the court and of equal validity with the other." *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.*, 199 U.S. 160, 166; *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143. [265 U.S. at 486]

effect of every decision in this Court would be reduced to its lowest common denominator. It is our understanding, however, that one of the principal functions of an appellate court, and especially of this Court of last resort, is to determine, in the course of writing its decision, whether under all the circumstances a broad or narrow holding should be enunciated.[2]

Here, there is ample evidence that the *Servette* Court consciously and deliberately determined that the publicity proviso was intended by Congress to be as broad as the prohibition in § 8(b)(4)(ii) and thereby to foreclose further controversies as to where the line should be drawn. The strongest evidence of the Court's intent is, of course, its own reasoning, especially its recognition that "the proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded." (377 U.S. at 55). Petitioner does not explain why this analysis, which is based squarely on the legislative history (more fully elaborated in *Tree Fruits*, 377 U.S. at 69-71) should be reduced to *dictum*, and the *Servette* discussion of the meaning of the word "product" under other statutes, which was not mentioned in the debates, should be ele-

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[2] Compare Hart, *Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 99 (1959):

> Opinions which deal only routinely with [the] contentions [of counsel] and with the relevant authorities can at best clear up only a few surface difficulties. They lack the underpinning of principle which is necessary to illumine large areas of the law and thus to discharge the function which has to be discharged by the highest judicial tribunal of a nation dedicated to exemplifying the rule of law not only to itself but to the whole world. Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. Only opinions of this kind can be worked with by other men who have to take a judgment rendered on one set of facts and decide how it should be applied to a cognate but still different set of facts.

vated to the only holding of the case.[3] Moreover, as we have noted, in *Tree Fruits* the Court reiterated its interpretation of the publicity proviso as stated in *Servette's* "primary holding" quoted *supra*, p. 9. (See *Tree Fruits*, 377 U.S. at 70-71 also quoted *supra*, p. 10.) Three members of the Court (Justice Black who concurred in the result on constitutional grounds, and Justices Harlan and Stewart, who dissented), disagreed with the *Tree Fruits* Court's refusal to infer from the proviso that *all* secondary consumer picketing was to be prohibited; but none of them differed with the Court's construction of the proviso as it applies to non-picketing publicity. Given their difference with the *Tree Fruits* majority on the picketing issue, they would presumably have been particularly alert to note their objection if they had believed that the Court's opinion in *Servette* was too permissive; instead, they joined in that unanimous decision without qualification.

We now show that what is undoubtedly *Servette's* primary holding should be followed not only out of respect for precedent, but because that holding embodies a correct construction of the proviso.

3. In *Servette*, the Court referred to the discussion of the origin and purpose of the publicity proviso in the companion *Tree Fruits* case. In the latter decision, the Court first outlined the legislative situation in 1959 as it stood after the House and the Senate had passed differ-

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[3] Petitioner's need to reargue what was decided in *Servette* is further exemplified by its reliance at Pet. Br. 13-14 on the failure to adopt the portion of Senator Kennedy's August 28, 1959 resolution seeking instructions from the Senate to its conferees on how to resolve several questions, including the legal status of non-picketing publicity. The same argument was made by the respondent in *Servette* and was expressly rejected in a footnote to the portion of the opinion on which the petitioner here otherwise relies. (377 U.S. at 56 n. 15.) Does the petitioner think that this portion of the opinion was *dictum?*

ing labor reform bills and those bills had been referred to conference:

> The story of the 1959 amendments, which we have detailed at greater length in our opinion filed today in *Labor Board* v. *Servette, Inc., ante*, p. 46, begins with the original § 8(b)(4) of the National Labor Relations Act. Its prohibition, in pertinent part, was confined to the inducing or encouraging of "the employees of any employer to engage in, a strike or a concerted refusal . . . to . . . handle . . . any goods . . ." of a primary employer. This proved to be inept language. Three major loopholes were revealed. Since only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a "strike or a concerted refusal" was prohibited, pressure upon a single employee was not forbidden. Finally, railroads, airlines and municipalities were not "employers" under the Act and therefore inducement or encouragement of their employees was not unlawful.
>
> When major labor relations legislation was being considered in 1958, the closing of these loopholes was important to the House and to some members of the Senate. [377 U.S. at 64-65.]

In the Senate the majority sentiment was against adding §8(b)(4) amendments to legislation primarly directed to regulating internal union affairs:

> [T]he prevailing Senate sentiment favored new legislation primarily concerned with the redress of other abuses, and neither the Kennedy-Ives bill, which failed of passage in the House in the Eighty-fifth Congress, nor the Kennedy-Ervin bill, adopted by the Senate in the Eighty-sixth Congress, included any revision of § 8(b)(4). Proposed amendments of § 8(b)(4) offered by several Senators to fill the three loopholes were rejected. [377 U.S. at 65-66, footnotes omitted.]

The House bill, however, included the prohibition eventually enacted as § 8(b)(4)(ii):

> From the outset the House legislation included provisions concerning secondary boycotts. The Landrum-Griffin bill, which was ultimately passed by the House, embodied the Eisenhower Administration's proposals as to secondary boycotts. * * *
>
> In the debates before passage of the House bill [Rep. Griffin] stated that the amendments applied to consumer picketing of customer entrances to retail stores selling goods manufactured by a concern under strike, if the picketing were designed to "coerce or to restrain the employer of [the] second establishment, to get him not to do business with the manufacturer . . .," and further that, "of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to *coerce the retailer not to do business* with the manufacturer"—then such a boycott could be stopped. (Italics supplied.)
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> The relevant changes in former § 8(b)(4) made by the House bill substituted "any individual employed by any person" for the Taft-Hartley wording, "the employees of any employer," deleted the requirement of a "concerted" refusal, and made it an unfair labor practice "to threaten, coerce, or restrain any person" where an object thereof was an end forbidden by the statute, *e.g.*, forcing or requiring a secondary employer to cease handling the products of, or doing business with, a primary employer. [377 U.S. at 67-68; footnote omitted.]

We pause to note that the words "threaten, coerce or restrain" do not unambiguously encompass union handbills, newspaper advertisements and like non-picketing forms of publicity asking consumers not to patronize A because of A's economic relationship with B (with whom the union has a labor dispute). And, as the statement of Rep. Griffin indicates, when the proponents of § 8(b)(4)

(ii) specified what type of conduct constitutes "threatening, coercing or restraining" the reference is invariably to picketing. So far as is shown by this Court's extensive researches of the 1959 legislative history as documented in *Tree Fruits* and *Servette*, petitioner's researches of the same materials as documented in its brief here and our researches, not one of the proponents of § 8(b)(4)(ii) ever stated that non-picketing "do not patronize" publicity is an evil that §8(b)(4)(ii) was aimed at correcting.

Moreover, what the proponents of § 8(b)(4)(ii) did and did not say must be evaluated against the background provided by the distinction between picketing and other forms of publicity firmly embedded in the law in 1959. (See the line of cases summarized in *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284, 286-293 (1957), and our discussion of the constitutional issue presented by this case at pp. 34-49, *infra.*) Thus, in *N.L.R.B.* v. *International Ass'n of Machinists Etc.*, 263 F.2d 796 (C.A. 9; Feb. 4, 1959) (*Alloy Mfg. Co.*), the court of appeals reversed a Board decision that a union had restrained and coerced the employees of Alloy Mfg. Co. in violation of § 8(b)(1)(A) by placing Alloy on the union's "we do not patronize" list and by urging consumers not to deal with *Alloy*.[4] In reversing the Board on this point,[5] the Ninth Circuit distinguished in the clearest

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[4] The Board's decision, 119 NLRB 307, followed by five days, and expanded, its decision in the *Curtis Bros.* case, 119 NLRB 232, which had held that picketing by a minority union to compel an employer to recognize the union as the employees' exclusive bargaining representative "restrain[s] or coerce[s]" the employees in violation of § 8(b)(1)(A). (*Curtis Bros.* was disapproved, after the enactment of the 1959 amendments, in *Labor Board* v. *Drivers Local Union*, 362 U.S. 274).

[5] The respondent union in *Alloy* had also engaged in picketing the premises of the struck employer, but the legality of that conduct was not considered by the court of appeals because the union had not preserved the issue before the Board. (See 263 F.2d at 799.)

possible terms between picketing and other forms of communication:

> We consider the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the 1st amendment guaranteeing freedom of speech. These aspects are more protected than picketing which although within said area "exert influences, and produces consequences different from other modes of communication." Hughes v. Superior Court, 1950, 339 U.S. 460, 465. In order to adopt the Board's finding as to the illegality of Union's action now under consideration, we would need a clearer mandate from Congress than the general terminology of the applicable statutes. If such a mandate be given, it then would be the time to consider any constitutional questions raised.
>
> The order of the Board is ordered enforced to the extent that it prohibits picketing and set aside in so far as it prohibits listing of Alloy on the "We Do not Patronize" list and the importuning of customers not to patronize Alloy. [263 F.2d at 799-800] [6]

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[6] The Court of Appeals also quoted with approval the reasoning of the Board's Trial Examiner:

> There remains for consideration the finding of the Board that the action of Union in including Alloy in its "We Do Not Patronize" list and by urging others not to do business with Alloy exercised restraint and coerced Alloy's employees. The trial examiner had found that such activities were not prohibited. The Board did not adopt that finding. We are required to consider this action of the Board because Alloy filed objections to the findings of the examiner on these issues.
>
> We are not in accord with the Board's action in reversing the examiner. We think he reached the correct conclusion and are so impressed with his reasoning that we quote a portion of what he said: "When invited or urged to join a union an employee may pause to reflect upon the advantages or disadvantages inherent in his choice. Alloy's employees have considered the question and have decided that they prefer not to have representation. As in all such decisions self interest has its play. Workers sometimes, at least, join unions because they

As this Court recently reiterated, "We may presume 'that our elected representatives, like other citizens, know the law'". (*Director, OWCP* v. *Perini North River Assoc.*, —— U.S. ——, 51 L.W. 4074, 4080 (Jan. 11, 1983) quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697.) Here it is not necessary to invoke that presumption, because the 1959 legislative history affirmatively demonstrates Congress' awareness of *Alloy* and of the First Amendment jurisprudence on which that decision rests. "Senator Humphrey first sounded the warning" (*Tree Fruits*, 377 U.S. at 65), that § 8(b)(4)(ii)'s imprecise language could be read as indicating a congressional intent to go beyond a prohibition of the "isolated evil" of consumer picketing aimed at a total boycott. In so doing, Senator Humphrey stated:

> At present a union may distribute leaflets at the premises of a neutral employer to persuade consumers not to buy the product of the struck employer.

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hope to gain some economic benefit and sometimes are deterred from doing so by comparable considerations. It is true that business operations employing union labor will be preferred by some customers and avoided by others solely upon the basis of that factor. This circumstance operates to benefit employees or not to depending upon the choice made in relation to the predilections of their employer's clientele. Because their employer's business may be affected by such a choice it follows that the employees themselves have an economic stake in the reaction of customers to their designation of a bargaining representative or refusal to do so. So it may well be said that the selection of a union representative is often or perhaps always made in a climate not entirely free from elements which have a coercive quality. *These elements are a part of the very fabric of industrial and commercial life quite beyond the reach of any conceivable statutory remedy. I do not doubt the right of the Respondent to publicize by appropriate means the fact that Alloy's employees are not represented by a union and even to persuade others by peaceful and truthful propaganda not to patronize Alloy for that reason if the persuasion is attempted to be accomplished by no more than the expression of 'views, argument, or opinion'.*" [263 F.2d at 799; emphasis added.]

That is the law at the present time. If the persuasion is successful the neutral loses sales. Does this constitute restraint and coercion of the neutral employer? Under present law, it does not; but if the amendment shall be adopted, it will be necessary to go through a whole series of court actions again, and no one in the labor-management picture will know for many years where he stands. As a matter of fact, some of the amendments I have examined lend themselves not to labor-management peace, not to labor-management stability, but to labor-management instability and to confusion confounded. I suggest that rather than try to add to the troubles and the complexity of the law, we should try to simplify matters and learn how to utilize the law which we have, where that law is just and equitable.

The Board has indeed held that to place an employer on a "We Do Not Patronize" list is to restrain and coerce him. The Court of Appeals for the Ninth Circuit set aside the Board's determination and pointed out that the union's conduct was "within the general area of protection of the first amendment guaranteeing free speech," (*NLRB* v. *IAM, Local 942*, C.A. 9, No. 15, 814, February 4, 1959, sl. op. p. 6.) [That opinion is described and discussed *supra* pp. 17-18 & n.6.]

I fear that this proposal may well invade this area. I ask the Senate to hold with Chief Justice Stone that the "publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the first amendment which cannot be made unlawful by act of Congress."

The citation is a familiar one to lawyers and even to some of us laymen: *United States* v. *Hutcheson*, 312 U.S. 219, 243. [II National Labor Relations Board, Legislative History of the Labor-Management

Reporting and Disclosure Act of 1959 (GPO, 1959) p. 1037 (hereafter "Leg. Hist.").[7]

The response of the conferees on the House and Senate labor reform bills to that warning is described by the *Tree Fruits* Court as follows:

> Senator Kennedy presided over the Conference Committee. He and Congressman Thompson prepared a joint analysis of the Senate and House bills. This analysis pointed up the First Amendment implications of the broad language in the House revisions of § 8(b)(4) stating,
>
> > "The prohibition [of the House bill] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
> >
> > * * * *
> >
> > ". . . one of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression."
>
> This analysis was the first step in the development of the publicity proviso, * * *. Because of the sweeping language of the House bill, and its implications for freedom of speech, the Senate conferees refused to accede to the House proposal without safeguards for the right of unions to appeal to the public, even

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[7] The *Alloy* litigation was also familiar to the conferees on the 1959 amendments to the NLRA. In describing the new § 8(b)(7), the House Conference Report said in part:

> Section 8(b)(7) overrules the *Curtis* & *Alloy* cases to the extent that those decisions are inconsistent with Section 8(b)(7). [1 Leg. Hist. 945]

It is clear that it was the Board's and not the courts of appeals' decisions in *Curtis* and *Alloy* which were thereby overruled, since § 8(b)(7) outlaws only organization and recognition picketing, and the Ninth Circuit's *Alloy* decision left the picketing issue under § 8(b)(1) undecided. (*See supra*, pp. 17-8.)

by some conduct which might be "coercive." The result was the addition of the proviso. [377 U.S. at 69; footnote omitted.]

That understanding of the proviso's purpose is firmly rooted in Senator Kennedy's explanation to the Senate of the Conference Report:

> When we view the significant provisions of the Landrum-Griffin bill, one after another, in my opinion we must admit they go far beyond reform, and I will document that tomorrow. They go into an area which I think would limit what we all would consider legitimate activities of men and women who bargain collectively.
>
> Changes which were made, and, speaking from the point of view of Senator MCNAMARA and Senator RANDOLPH, our views have been uniform in this matter. The changes which we believe to be particularly desirable are * * *.
>
> Secondly, the House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant.
>
> We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper.
>
> Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth. [II Leg. Hist. 1388-1389.]

And, the next day, Senator Kennedy added:

> [I]n the 12 days during which the conference met the majority of the Senate conferees secured important changes in the restrictive provisions of the Landrum-Griffin bill, thereby protecting traditional

> and essential rights of working men seeking to improve conditions of employment. It is important that the Senate should note these changes:
>
> * * * *
>
> (c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.
>
> Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site. [II Leg. Hist. 1432.]

As the Court stated last term in words equally applicable here, "Since the proviso was added to § 8(e) at the Senate conferees' insistence, and since Senator Kennedy was chairman of the Senate conferees, his explanation of the clause is entitled to substantial weight." (*Woelke & Romero Framing Co.* v. *NLRB*, —— U.S. ——, 50 L.W. 4538, 4541 n. 9 (May 24, 1982).)

The remaining comments on the publicity proviso are notable chiefly in that there is not one word by any of the proponents of the Conference Report: contradicting Senator Kennedy's assurance that "what" the proviso "permit[s is] the giving out of handbills or information through the radio and so forth;" suggesting that the legality of such publicity turns on the precise nature of the

economic relationship between the primary and secondary employers; or even referring to the phrase on which petitioner rests its case—"producer-distributor relationship." Rep. Thompson's statement (II Leg. Hist. 1721), like Senator Kennedy's second statement quoted above, did invoke the familiar example of publicity aimed at retailers selling a "non-union good." But those statements do not suggest that the *exclusive* purpose of the proviso is to provide protection in that one instance, rather than that the proviso's purpose is to provide protection in that instance as well as in others. Indeed, the only statement even arguably to the contrary is by Rep. Libonati who voted *against* the Conference Report. (II Leg. Hist. 1702).[8]

The sum of the matter is this: the law in 1959 was that methods of publicity other than picketing are entitled to a higher degree of First Amendment protection than picketing and that general words such as "threaten, coerce or restrain" do not reach non-picketing "do not patronize" publicity aimed at the general public; the proponents of § 8(b)(4)(ii) never claimed that the provision was intended to prohibit any form of "do not patronize" publicity other than secondary picketing seeking a total boycott; and the proponents of the publicity proviso stated that they feared that, absent a contrary expression of congressional intent, § 8(b)(4)(ii) might be construed to reach non-picketing forms of publicity, that such a result would be a "basic infringement upon freedom of expression" and hence was unacceptable and, after the publicity proviso was added to § 8(b)(4) in conference, stated that their objection had been met and the proviso "permit[s] * * * the giving out of handbills or information through the radio or so forth."

4. All of this, we submit, makes an overwhelming case for the *Servette* Court's conclusion that the legisla-

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[8] Senator Goldwater's observations, quoted at Pet. Br. 16, notes 20 and 21, were made after the bill was signed (see II Leg. Hist. 1943), and are not part of its legislative history.

tive materials on their face show that Congress' intent in the proviso was to create an exception to § 8(b)(4)(ii)'s prohibition no narrower than the prohibition itself. But there is more.

First, reading the publicity proviso more narrowly than § 8(b)(4)(ii)'s prohibition creates anomalies that should not lightly be attributed to Congress. In contrast, the *Servette* reading of the proviso, which leaves untouched the free speech right to advise consumers that there is a labor dispute and to ask their aid recognized prior to 1959 creates no such anomalies. We cannot tell from petitioner's brief what line would be cut between the labor disputes that could lawfully be publicized and those that could not if the terms of the proviso—"employer" "products", "produced" and "distributed"—are given narrow technical meanings and are read as "words of special limitation" designed to assure that publicity is permitted only if the secondary employers have a "unity of interest" with the primary employer. (Pet. Br. 6-7.)[9] But this

[9] Petitioner's references to "improperly injured neutral, unrelated employers who had no control or power to terminate the underlying controversy" and its emotional objection that the "decisions below would thus widen industrial strife to encompass innumerable neutral employers whom Congress sought to insulate from the devastating effects of a secondary boycott" (Pet. Br. 28) establish only that the dispute here is "secondary." That demonstration adds nothing to petitioner's case, since if the dispute were primary (as in the cases referred at Pet. 9, n. 7), there would be no occasion for considering the scope of the proviso. Petitioner's rhetoric thus begs the question before the Court, which is whether Congress intended, in permitting publicity other than picketing, to distinguish among secondary boycotts. As *Servette* recognized, Congress did not intend to do so.

The hazardous nature of such an attempted distinction is illustrated by petitioner's effort to minimize the relationship between itself and the tenant stores and High (the struck employer) and Wilson's (the mall department store which High constructed). (Pet. Br. 21-28). DeBartolo's own tightly drawn lease arrangements reflecting the economic interdependence of all participants in a shopping center venture, impeach that effect. Indeed, Wilson's, as a

much can fairly be said if technical definitions are to govern.

The term "employer" used in the proviso is narrower than the term "person" used in § 8(b)(4)(ii)'s prohibition; that, as we have seen, is why § 8(b)(4) was amended in 1959 to strike "employer" and substitute "person". Thus, if "employer" is given a narrow technical meaning all publicity concerning the fact that a secondary employer does business with a "person who is not an "employer" and who is embroiled in a primary labor dispute would be unlawful.[10]

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department store in the shopping center, is particularly important to the success of the other stores. As one commentator has observed:

> One of the primary determinants of the success of a regional center is the consumer drawing power of the department stores which are the venture's "anchor tenants." In many respects, the developer is renting the right to locate next to the major tenants and to benefit from their ability to attract potential customers to the center. The reputation, quality, and merchandising capability of the major tenants are thus major factors in attracting lesser tenants. [Note, The Antitrust Implications of Restrictive Covenants in Shopping Center Leases, 86 Harv. L. Rev. 1201, 1205, text and note at n. 17 citing Sweet, *Tenant-Selection Policies of Regional Shopping Centers*, 23 J. Mktg. 399, 399-400 (1959)].

See also *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733, 737-739, 741-742, 744 (C.A. 8); *Net Realty Holding Trust* v. *Franconia Properties*, 544 F. Supp. 759, 767 (E.D. Va.). (We of course express no views concerning the antitrust issue which is the subject of the foregoing note and cases.)

[10] Indeed, the use of the word "employer" is facial evidence that the proviso was drafted in haste and without a regard for nice and careful phrasing. As we point out in the text it is incongruous to to assume that by using the word "employer" in the proviso Congress intended to withhold from its protection publicity directed at products produced by one businessman and distributed by another, if either is not an "employer" within the meaning of § 2(2). The amendment just discussed, as well as the other two "loopholes" which were closed by the 1959 amendment all resulted, of course, from what Congress considered "to be inept language" (see *Tree*

By the same token, if "distributed" is given a narrow technical meaning, that would, on petitioner's method of approach, make unlawful not only the publicity in this case but in cases in which the publicity results from the fact that a secondary is doing business with a primary who provides the secondary with services that are not incorporated in a discrete manufactured item—such as constructing the secondary's store or cleaning that store or auditing the secondary's books, etc.

There is nothing in the labor law generally or in the 1959 amendments in particular that supports the view that Congress had the "incongruous purpose" (*Servette*, 377 U.S. at 55), never expressed, to pick and choose between different underlying labor disputes in this way—leaving industrial workers their prior free speech rights and denying those rights to workers who engage in collective bargaining with "persons" other than "employers" and to workers who bargain with employers in the construction industry and in certain service industries.[11] Rather, it appears that the 1959 Congress, like its predecessors, was willing to leave it to the informed consumer to determine whether the fact that a secondary has a certain economic relationship with a primary in a labor dispute shows a sufficient "unity of interest" between the two to be a basis for not patronizing the secondary.

Second, this Court has reepatedly recognized the dangers of a dryly literalistic approach to ascertaining the meaning of the secondary boycott provisions added to the

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Fruits, 377 U.S. at 64) thus giving further point to the dangers of strict literalism in interpreting the secondary boycott provisions. (See also *infra*, p. 28.)

[11] Contrast the provisos to § 8(e) which were also written in conference in response to Senate objections to the House bill and which do distinguish among particular industries because of their special characteristics to which the conferees adverted in the explanations of their bill.

NLRA in 1947 and 1959. See, *e.g.*, *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 621, 628, where the Court following *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 619, laid out the following guide to construing § 8(e) and its proviso: "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459."

So, too, in *Servette* the Court rejected the narrowly literal interpretations the Ninth Circuit had adopted with respect to § 8(b)(4)(i) (see 377 U.S. at 49) as well as (ii) and the related publicity proviso (377 U.S. at 55). See also, *Labor Board* v. *Rice Milling Co.*, 341 U.S. 665, 672; *Labor Board* v. *Electrical Workers*, 366 U.S. 667, 672; *Tree Fruits, supra*, 377 U.S. at 71-72; *NLRB* v. *Operating Engineers*, 400 U.S. 297, 302-303. Confining the scope of the publicity proviso to the class of secondary disputes most directly brought to mind by the bare words used therein would be contrary not only to these decisions, but to the Court's characteristic method in construing the NLRA and its amendments in recognition of the "commonplace" that "labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable." (*Machinists Local* v. *Labor Board*, 362 U.S. 411, 428 (Harlan, J.)).

Third, to this point we have not invoked, despite its obvious relevance, the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which [a] constitutional question may be avoided." (*Crowell* v. *Benson*, 285 U.S. 22, 62, quoted most recently in *United States* v. *Security Industrial Bank*, —— U.S. ——, 51 L.W. 4007, 4009 (Nov. 30, 1982).) This "principle of wisdom and duty" (*United States* v. *Rumely*, 345 U.S. 41, 47) was recently expounded and applied in construing the NLRA in *NLRB*

v. *Catholic Bishop of Chicago*, 440 U.S. 490. The Court reasoned:

> Although the respondents press their claims under the Religion Clauses, the question we consider first is whether Congress intended the Board to have jurisdiction over teachers in church-operated schools. In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available. Moreover, the Court has followed this policy in the interpretation of the Act now before us and related statutes.
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> In *Machinists* v. *Street*, 367 U.S. 740 (1961), for example, the Court considered claims that serious First Amendment questions would arise if the Railway Labor Act were construed to allow compulsory union dues to be used to support political candidates or causes not approved by some members. The Court looked to the language of the Act and the legislative history and concluded that they did not permit union dues to be used for such political purposes, thus avoiding "serious doubt of [the Act's] constitutionality." *Id.* at 749.
>
> Similarly in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), a case involving the Board's assertion of jurisdiction over foreign seamen, the Court declined to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations. The international implications of the case led the Court to describe it as involving "public questions particularly high in the scale of our national interest." *Id.* at 17. Because of those questions the Court held that before sanctioning the Board's exercise of jurisdiction "' there must be present the af-

> firmative intention of the Congress clearly expressed.'" *Id.*, at 21-22 (quoting *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).
>
> The values enshrined in the First Amendment plainly rank high "in the scale of our national values." In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction. [440 U.S. at 500-501]

Because the "values enshrined in the First Amendment plainly rank high 'in the scale of our national values'" the Court has adhered to this "prudential policy" with especial care in order to avoid serious constitutional questions under the First Amendment. (*Id.* at 501.) In addition to *Machinists* v. *Street*, cited in *Catholic Bishop*, see also, *e.g.*, *United States* v. *CIO*, 335 U.S. 106, 120-123; *United States* v. *Rumely*, *supra*, 345 U.S. at 45-48; *Schneider* v. *Smith*, 390 U.S. 17, 26-27; *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 369 (Opinion of White, J., for four Justices); 377 (Opinion of Harlan, J.); 378 (Opinion of Stewart, J.).

The background of § 8(b)(4)(ii) and the publicity proviso reveals no "affirmative intention" even muted, let alone "clearly expressed", on the part of Congress to outlaw publicity, by means other than picketing, urging members of the public not to patronize a secondary. The language of the proviso, which according to petitioner establishes the line between forbidden and lawful publicity, falls far short of the requirement of a clearly expressed affirmative intent that such publicity be outlawed. In *Rumely* the Court observed that in order to avoid constitutional doubt it had "very recently strained words more than they need to be strained here. *United States* v. *CIO*, 335 U.S. 106. The considerations which pre-

vailed in that case should prevail in this." (345 U.S. at 47) The same considerations should prevail here also, as a comparison with *C.I.O.* and *Catholic Bishop* (although many other illustrations could be chosen) will make clear.

The statutory provision at issue in *C.I.O.* (§ 313 of the Federal Corrupt Practices Act of 1925, as amended by § 304 of the Labor Management Relations Act of 1947) was a highly detailed regulation of political contributions and expenditures. (See 335 U.S. at 107-108, n. 1.) By its terms § 313 plainly prohibited the publication that was the subject of the indictment there; indeed four Justices, though concurring in the result on constitutional grounds, did not regard the interpretation which the Court had adopted to be "tenably supportable". (*Id.* at 131.) In *Catholic Bishop, supra*, the language of the jurisdictional provisions of the NLRA provided no basis whatever for excluding church-operated schools, although, in § 2(2) Congress had, both in the original statute and by subsequent amendment, defined with specificity the categories of employers subject to the Act. In light of the constitutional problem, however, the fact which the Court stressed in *Catholic Bishop* "was that both in 1935 when the National Labor Relations Act was originally adopted and in 1974 when Congress removed an exemption (adopted in 1947) ot exempt non-profit hospitals, there was no evidence that Congress gave any consideration to church-operated schools." (See 440 U.S. at 504-506.)[12]

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[12] The Court also noted it to be "not without significance" that in 1935 the Senate Committee "chose a college p.ofessor's dispute with a college as an example of employer-employee relationships *not* covered by the Act." (*Id.* at 504-505, emphasis in original.) However, neither the Board nor the Court has ever drawn from that history the conclusion that such disputes in non-church schools are generally outside the converage of the Act. (See *NLRB* v. *Yeshiva University*, 444 U.S. 672, excluding faculty members because of their management functions, but recognizing that professors may not be automatically excluded from the Acts' protections. (*Id.* at 690-691, n.31.))

C.I.O. and *Catholic Bishop* are likewise highly instructive in their approach to legislative history, in the context of the canon "that when a statute is ambiguous, 'construction should go in the direction of constitutional policy.'" (*Regional Rail Reorganization Cases*, 419 U.S. 102, 134, quoting *United States* v. *Johnson*, 323 U.S. 273, 276.) In *C.I.O.* the majority opinion set forth excerpts from the congressional discussion concerning § 313 (see 335 U.S. at 116-120) and some members of the Court found therein "definite indication that Congress did not intend to include within the coverage of the section as an expenditure the costs of the publication described in the indictment." (335 U.S. at 116). But a majority plainly did not share this view, because the Court's opinion continued:

> Some members of the Court, joining in this opinion, do not place the reliance upon legislative history that this opinion evidences, but reach the same conclusion without consideration of that history. From what we have previously noted, it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality. [335 U.S. at 120-121]

From the legislative history previously detailed, it is at least equally clear that the 1959 Congress "was keenly aware of the constitutional limitations on legislation," and "did not want to pass any legislation that would threaten interferences with the privileges of speech or press, or that would undertake to avoid the constitution." (*CIO*, 335 U.S. at 120, see *supra* pp. 14-24.) And in

Catholic Bishop, the Court relied on "expressions of concern [during the debate] about the effect of the bill on employees of religious hospitals whose religious beliefs would not permit them to join a union." (440 U.S. at 506.) The Court noted that the "result of those concerns was an amendment which reflects congressional sensitivity to First Amendment guarantees." (*Id.*, referring to § 19 of the Act, 29 U.S.C. § 169.) The foregoing legislative history in 1974 was given considerable weight in determining whether church-operated schools are covered at all by the NLRA, although as expressed during the debates, the concern had a relatively narrow focus—the opposition of religious hospital employees to joining the union—to which § 19 was a specific and precisely drawn response. Yet, against the background of the rule of construction quoted *supra*, p. 30, the Court drew therefrom a far broader lesson: "The absence of an 'affirmative intention of the Congress clearly expressed' fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers." (440 U.S. at 506.)

In the present case the Congress evidenced direct concern with the potential interference with freedom of speech by § 8(b)(4)(ii) as passed by the House. The result of that concern was the adoption of the publicity proviso which, as Senator Kennedy stated without contradiction, eliminated the threat to freedom of speech. Thus, the legislative history and the canon of construction of avoiding constitutional doubts, exemplified in *C.I.O.* and in *Catholic Bishop*, mutually reinforce the conclusion that "the protection of the proviso was [not] intended to be any narrower in converage than the prohibition to which it is an exception * * *." (*Servette*, 377 U.S. at 55).

Petitioner entirely ignores the rule of construction which has prevailed in this Court from *Murray* v. *The*

Charming Betsy, *supra*, in 1804 through *United States* v. *Security Industrial Bank*, *supra*, in 1982. Indeed, in urging the Court to consider and reject the respondents' anticipated constitutional argument, petitioner cites *Catholic Bishop* without acknowledging that the Court there *avoided* the First Amendment issue by its interpretation of the statute. (Pet. Br. 28 & n. 40 text and note.)[13] Petitioner thereby circumvents what is, under this Court's teachings, an independently insuperable objection to petitioner's proposed construction of § 8(b)(4) as amended by the addition of (ii) and the publicity proviso.[14]

II. Publication Of The Union Handbill Is Protected By The First Amendment

The constitutional question here is whether an absolute ban—backed by the sanctions, in §§ 10(c), 10(l) & § 303 of the NLRA, as amended, of the temporary injunction, the permanent injunction and damages—on *non-picketing publicity* by unions criticizing a business practice—here using a non-union company that pays substandard wages—and asking members of the general public not to patronize those who engage in that practice is contrary to the First Amendment.

1. In answering that question, we begin from the proposition that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual" (*First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777), and from the recognition that this Court's "recent decisions demonstrate that state action to punish the publication of truthful in-

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[13] The other case cited *id.* is *McCulloch* v. *Sociedad National*, 372 U.S. 10, which had been relied on in *Catholic Bishop*. (See *supra*, p. 29.)

[14] Like Petitioners, we have not, in the course of our statutory discussion, addressed the other exceptions to the publicity proviso (*e.g.*, that the publicity be truthful), because as noted at Pet. Br. 10-11 these exceptions are not at issue herein.

formation seldom can satisfy constitutional standards * * * state officials may not constitutionally punish publication of [such] information, absent a need to further a state interest of the highest order" (*Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102-103). And as we now show, where the means of disseminating such information is a handbill, the government interest in suppressing information directed to the general public to protect the businessmen criticized therein from the "economic pressure" (Pet. Br. 30) that would result if members of the public agree with the handbill's message, and on the basis of that agreement, exercise their undoubted right to make common cause with the union by not patronizing the criticized businessman is *not* of the "highest order." The governing precedent, we submit, is *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415. The genesis of that case was as follows:

> Petitioner Organization for a Better Austin (OBA) is a racially integrated community organization in the Austin neighborhood of Chicago. Respondent is a real estate broker whose office and business activities are in the Austin neighborhood. He resides in Westchester, Illinois, a suburb of Chicago some seven miles from the Austin area.
>
> It was the contention of OBA that respondent had * * * aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes. [402 U.S. at 415-416.]

OBA reacted by

> distribut[ing] leaflets in Westchester describing respondent's activities. There was no evidence of picketing in Westchester. The challenged publications, now enjoined, were critical of respondent's real estate practices in the Austin neighborhood; one of the leaflets set out the business card respondent used to solicit listings, quoted him as saying "I only sell to Negroes," cited a Chicago Daily News article describ-

ing his real estate activities and accused him of being a "panic peddler." Another leaflet, of the same general order, stated that: "When he signs the agreement, we stop coming to Westchester." Two of the leaflets requested recipients to call respondent at his home phone number and urge him to sign the "no solicitation" agreement. On several days leaflets were given to persons in a Westchester shopping center. On two other occasions leaflets were passed out to some parishioners on their way to or from respondent's church in Westchester. Leaflets were also left at the doors of his neighbors. The trial court found that petitioners' "distribution of leaflets was on all occasions conducted in a peaceful and orderly manner, did not cause any disruption of pedestrian or vehicular traffic, and did not precipitate any fights, disturbances or other breaches of the peace." One of the officers of OBA testified at trial that he hoped that respondent would be included to sign the no-solicitation agreement by letting "his neighbors know what he was doing to us." [402 U.S. at 417.]

At that juncture, Keefe brought the dispute to the Illinois courts and secured injunctive relief. (*Id.* at 417-418.) The Chief Justice's reasoning for the Court in overturning that injunction is so closely in point that we set out that portion of the opinion in full:

> This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. *E.g.*, *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Schneider* v. *State*, 308 U.S. 147 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to "force" respondent to sign a no-solicitation agreement. *The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.* Petitioners plainly intended to influence respondent's conduct by their activities; this is no fundamentally different

from the function of a newspaper. See *Schneider* v. *State, supra; Thornhill* v. *Alabama*, 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity. *Carroll* v. *Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. *No prior decisions support the claim that the interest of an indiviaual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.* [402 U.S. at 418-420; emphasis added.]

2. Petitioner argues that now there *are* such decisions relying most heavily on the analysis in *NAACP* v. *Claiborne Hardware Co.*, —— U.S. ——, 50 L.W. 5122 (July 2, 1982) and prior case in this Court cited and discussed therein. *Claiborne* concerned a "boycott of white merchants in Claiborne County Mississippi" (50 L.W. at 5122), that incluuded "elements of criminality and elements of majesty" (*id.*) that was carried on by a variety of means, including "nonviolent picketing" (*id.* at 5128), and that was marked by "acts of violence" (*id.* at 5130).

The portion of the *Claiborne* opinion in point here begins as follows:

Speech itself also was used to further the aims of the boycott. Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. *These elements of the boycott involve speech in its most direct*

form. In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. *Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.* As Justice Rutledge, in describing the protection afforded by the First Amendment, explained:

> "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opoprtunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins*, 323 U.S. 516, 537. [50 L.W. at 5128.]

And the *Claiborne* Court then cited and discussed *Organization For A Better Austin*, setting out the holding therein (quoted *supra*, p. ——). (See 50 L.W. at 5128-5129.)

At that juncture, the *Claiborne* Court added the passage from which petitioner plucks certain phrases:

> The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States* v. *O'Brien*, 391 U.S. 367. A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney* v. *Empire Storage*, 336 U.S. 490; *NLRB* v. *Retail Store Employees Union*, 447 U.S. 607. The right of business entities to "associate" to suppress competition may be curtailed. *National Soc. of Professional Engineers* v. *United*

> *States*, 435 U.S. 679. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB* v. *Retail Store Employees Union*, *supra*, at 617-618 (BLACKMUN, J., concurring). See *International Longshoremen's Assoc.* v. *Allied International*, —— U.S. ——, ——. [50 L.W. at 5129; footnote omitted.]

None of these cited cases stands for the proposition that enjoining the publication of a handbill such as that here is "economic regulation" that has "an incidental effect" on free speech rather than a direct abridgement of free speech itself.

(a) The rule of *United States* v. *O'Brien*, 391 U.S. 367, as the opinion therein is at pains to emphasize, applies only "when 'speech' and 'nonspeech' elements are combined in the same course of conduct;" then "a sufficiently important governmental interest in regulating the *nonspeech element* can justify incidental limitations on First Amendment freedoms." (391 U.S. at 376; emphasis added.) This point is stated once again at the conclusion of the *O'Brien* Court's discussion of the First Amendment issue therein:

> The case at bar is * * * unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California*, 283 U.S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since

> the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB* v. *Fruit & Vegetable Packers Union*, 377 U.S. 58, 79 (1964) (concurring opinion). [391 U.S. at 382.]

We are, of course, physical beings and, thus, there is no method of communication that does not in an attenuated sense involve "speech" and "nonspeech" elements. But *O'Brien* does not emasculate the distinction between those two elements. In the First Amendment area, the government interest must be to end the "evil" created by the "speaker's" *physical actions* not the "evil" deemed to inhere in the message of the communication itself or in the possibility that the message may find a receptive audience.

(b) Both *Retail Store Employees*, *supra*, 447 U.S. 607, and *International Longshoremen* v. *Allied International, Inc.*, —— U.S. ——, 50 L.W. 4402 (April 20, 1982) were similarly analyzed by the Court as cases involving the regulation of a "non-speech" element where " 'speech' and 'non-speech' elements are combined in the same course of conduct."

There is no opinion for the Court on the constitutional issue presented in *Retail Store Employees*—whether § 8(b)(4)(ii) may, consistent with the First Amendment, be construed to prohibiting a union's peaceful picketing directed to the general public advising that A has an economic relationship with B (with whom the union has a labor dispute) and asking that consumers on that account not patronize A. But all three opinions that answer that question "yes" emphasize that picketing, like draft-card burning, has a non-speech element that may be regulated despite the incidental effect on the right to communicate. Justice Powell, speaking for himself, the Chief Justice and Justice Stewart said:

> Although the Court recognized in *Tree Fruits* that the Constitution might not permit "a broad ban against peaceful picketing," the Court left no doubt that Congress may prohibit *secondary picketing* calculated "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." 377 U.S. at 63. Such *picketing* spreads labor discord by coercing a neutral party to join the fray. In *Electrical Workers* v. *NLRB*, 341 U.S. 694, 705 (1951), this Court expressly held that a prohibition on "*picketing* in furtherance of [such] unlawful objectives" did not offend the First Amendment. See *American Radio Assn.* v. *Mobil S.S. Assn.*, 419 U.S. 215, 229-231 (1974); *Teamsters* v. *Vogt, Inc.*, 354 U.S. 284 (1957). We perceive no reason to depart from that well-established understanding. As applied to *picketing* that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech. [447 U.S. at 616; emphasis added.]

Justice Blackmun, in his opinion concurring in the result, added:

> I have never been fully comfortable with [*Police Department of Chicago* v. *Mosley's*] equating all content selectivity in affording access to *picketers* with censorship. See *Mosley*, 408 U.S. [92] at 102 (concurring statement). For this reason, I join today in MR. JUSTICE REHNQUIST'S dissenting opinion in *Carey* v. *Brown* [477 U.S. 455]. I concur in the result in this case, however, only because I am reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employees, employees, and consumers to remain free from coerced participation in industrial strife. My vote should not be read as foreclosing an opposite conclusion where another statu-

> tory ban on *peaceful picketing*, unsupported by equally substantial governmental interests, is at issue. [447 U.S. at 617-618.]

While neither of the foregoing opinions elaborates the legal significance of the repeated references to "picketing," Justice Stevens, concurring in the result, placed *Retail Store Employees* in line with its antecedents:

> The constitutional issue, however, is not quite as easy as the Court would make it seem because, as Mr. Justice Black pointed out in *Tree Fruits*, "we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views." *Id.*, at 79. In other words, this is another situation in which regulation of the means of expression is predicated squarely on its content. See *Consolidated Edison Co.* v. *Public Service Comm'n*, *ante*, [447 U.S.] at 546 (STEVENS, J., concurring in judgment). I agree with the Court that this content-based restriction is permissible but not simply because it is in furtherance of objectives deemed unlawful by Congress. *Ante*, at 616. That a statute proscribes the otherwise lawful expression of views in a particular manner and at a particular location cannot in itself totally justify the restriction. Otherwise the First Amendment would place no limit on Congress' power. In my judgment, it is our responsibility to determine whether the method or manner of expression, considered in context, justifies the particular restriction.
>
> I have little difficulty in concluding that the restriction at issue in this case is constitutional. Like so many other kinds of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers* v. *Wohl*, 315 U.S. 769, 776-777, Mr. Justice Douglas stated:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particlar locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the those aspects of picketing make it the subject of restrictive regulation."

Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea. And the restriction on picketing is limited in geographical scope to sites of neutrals in the labor dispute. Because I believe that such restrictions on conduct are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute, I agree that the statute is consistent with the First Amendment. [447 U.S. at 618-619; omitting the footnote citing *Teamsters Union* v. *Vogt, Inc.*, *supra* and *Hughes* v. *Superior Court*, 339 U.S. 460.] [15]

Hughes, which like *Retail Store Employees* involved a consumer boycott, is the most complete statement of the theory of the picketing cases:

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[15] In *Allied International*, Justice Powell, speaking for the Court, explained *Retail Store Employees* by referring to Justice Stevens' opinion therein and to *O'Brien*:

> Cf. *NLRB* v. *Retail Stores*, 447 U.S. 607, 619 (1980) ("The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.") (Stevens, J., concurring); *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). [50 L.W. at 4406, n.26.]

> [W]hile picketing is a mode of communication it is inseparably something more and different. * * * *Publication in a newspaper, or by distribution or circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.* The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.
>
> * * * However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. [339 U.S. at 464-465.]

(c) Finally, *Allied International, supra*, like *Giboney* v. *Empire Storage Co.*, 336 N.S. 490 (cited in *Claiborne*) and *Electrical Workers* v. *Labor Board*, 341 U.S. 694 (cited by Justice Powell in *Retail Store Employees*), involved, in the Court's view, speech by a union directed to union members subject to union discipline rather than to the general public ordering or signalling those members ot engage in *conduct prohibited by a valid law*—a situation in which under general principles neither the speech nor the conduct is entitled to First Amendment protection:

> On January 9, 1980, Thomas Gleason, President of the International Longshoremen's Association (ILA), ordered ILA members to stop handling cargoes arriving from or destined for the Soviet Union. Gleason took this action to protest the Russian invasion of Afghanistan. In obedience to the order, longshoremen up and down the East and Gulf Coasts refused to service ships carrying Russian cargoes.
>
> * * * *
>
> Application of § 8(b)(4) to the ILA's activity in this case will not infringe upon the First Amendment rights of the ILA and its members. We have consistently rejected the claim that secondary picket-

> ing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment. See *e.g.*, *NLRB* v. *Retail Store Employees*, *supra*, 447 U.S., at 616; *American Radio Assn.* v. *Mobile S.S. Assn.*, *supra*, 419 U.S., at 229-231. Cf. *NLRB* v. *Fruit Packers*, 377 U.S. 58, 63 (1964). It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment. The labor laws reflect a careful balancing of interests. See *NLRB* v. *Retail Stores*, *supra*, at 617 (BLACKMUN, J. concurring). There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others. [50 L.W. at 4402-4403, 4406; footnotes omitted.]

In *Giboney*, Justice Black, in rejecting the contention that the picketing could not constitutionally be enjoined "because the picketers were attempting peacefully to publicize truthful facts about a labor dispute" (*id.* at 497-498), had stressed:

> [A]ll of appellants' activities—their powerful transportation combination, their patrolling, *their formation of a picket line warning union men not to cross at peril of their union membership*, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.
>
> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. [336 U.S. at 498; emphasis added]

3. The instant case could not be more unlike those we have just reviewed and on which petitioner relies.

(a) The handbills seek a completely lawful response: there is no law requiring members of the general public

to patronize retailers who have an economic relationship with non-union contractors. Nor is there any basis for contending that the Union has any coercive powers—akin to its power to discipline union members or an employer's power to take adverse economic actions against his employees—over those to whom the "do not patronize" appeal is addressed.[16]

(b) The only method of communication used by the Union is handbilling—a method of communication that, as Justice Stevens noted in *Retail Store Employees* "depend[s] entirely on the persuasive force of the idea" stated therein and hence in contrast to picketing is not subject to regulation on the ground that the "effort to communicate * * * calls for an automatic response to a signal rather than a reasoned response to an idea" (447 U.S. at 619). In *Lovell* v. *Griffin*, 303 U.S. 444, Chief Justice Hughes speaking for the Court stated:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near* v. *Minnesota, supra; Grosjean* v.

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[16] It is because of this distinction that *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, the only one of the First Amendment labor relations cases in this Court not discussed in the text does not illuminate this case. The recognition there that "the economic dependence of the employees on their employers" may be "taken into account" in assessing the constitutionality of the regulation of employer speech (*id.* at 617), like the Court's evaluation of union "signals" to members, shows that context may be important in First Amendment cases. But the context here does not differ in any way from that in *Organization For A Better Austin.*

> *American Press Co., supra; De Jonge* v. *Oregon, supra.* [303 U.S. at 452; footnote omitted.]

And, as *Organization For A Better Austin* shows, the Court has never retreated from *Lovell's* holding.

(c) The message of the Union's handbill is at the heart of the First Amendment's protections. In *Organization For A Better Austin* the Court stated: "Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. *See Schneider* v. *State, supra*; *Thornhill* v. *Alabama*, 310 U.S. 88 (1940)." As its citation shows, while *Thornhill's* specific teachings with regard to the First Amendment status of picketing has since been limited, *Thornhill's* broader teachings with regard to the large purposes of the First Amendment and the Amendment's scope have stood the test of time and of close scrutiny. The pertinent discussion there is in three parts. The first states a major premise that cannot be denied:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.
>
> * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. [310 U.S. at 101-102]

The second in the most urgent and eloquent terms shows why that premise applies to speech concerning a labor dispute:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of

free discussion that is guaranteed by the Constitution.

* * *

It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. [310 U.S. at 102-103.]

The third and final passage anticipates and answers petitioner's argument that speech concerning a labor dispute may be suppressed on the ground that it is mere "economic activity" (Pet. Br. 29) subject only to the permissive constitutional test for regulating such activity:

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis [dissenting in *Duplex Co.* v. *Deering*, 254 U.S. 433] It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely in-

dustrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

* * * It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. *Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.* [310 U.S. at 103-105, emphasis added.]

In our view, the legislative history of the 1959 amendments demonstrates that Congress, recognizing that non-picketing forms of publicity do afford the opportunity to test the merits of competing views concerning a labor dispute, and respecting the "high place of the First Amendment in the scale of our national values" (*Catholic Bishop, supra*), did not outlaw non-picketing "discussion of matters of public interest merely [because] some members of the public] may there by be persuaded to take action inconsistent with" the interests of some businessmen. By adopting the publicity proviso, Congress intended to assure that such discussion would not be forbidden by § 8(b)(4)(ii). (*Servette, supra*, 377 U.S. at 55; *Tree Fruits, supra*, 377 U.S. at 70-71.) But if the foregoing interpretation of the proviso is now disapproved, the Act

must to that extent be held to be inconsistent with the restrictions of the First Amendment.[17]

CONCLUSION

For the above stated reasons, the judgment below should be affirmed.

Respectfuly submitted,

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[17] As *Thornhill* shows, the question of whether a company operates union or nonunion concerns more than the employees' wages, hours, terms and conditions of employment; it concerns the type of industrial society we are to have in this Nation. Moreover, when a union asks members of the general public not to patronize retailers who are in an economic relationship with nonunion companies the request is not an appeal to the audience's immediate economic self-interest. Rather the request seeks a sacrifice in the interest of the ideal of a more perfect democracy in the workplace. For both these reasons a union "do not patronize" handbill is not "expression related solely to the economic interests of the speaker and its audience" such as "speech proposing a commercial transaction." (*Central Hudson Gas Co.* v. *Public Service Comm'n*, 447 U.S. 557, 561, 562.) Thus this case does not involve the "commercial speech" doctrine as most recently stated therein.

APPENDIX

PLEASE DON'T SHOP AT EAST LAKE SQUARE MALL PLEASE

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

FLA. GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO

PLEASE DO NOT LITTER

Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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H. Brown, *Franchising: Realities and Remedies*, (Rev. ed. 1981) 11

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Griffin, 13 Labor L. J. 355 (May 1962) 6

Koversky, *A Social and Legal Analysis of the Secondary Boycott*, 35 Or. L. Rev. 71 (1956) 8

S. McMichael and P. O'Keefe, *Leases: Percentage, Short and Long Term* (5th ed. 1959) 11

Meyer, *Ally Or Neutral—Secondary Boycott Dilemma*, 34 Tul. L. Rev. 343 (1960) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

INTRODUCTORY STATEMENT

The differences in the positions advocated by DeBartolo and the Board are few, albeit significant. There are, of course, a variety of definitions that could be given to the producer-distributor limitation contained in the publicity proviso to Section 8(b)(4). Both the Board and DeBartolo reject one extreme, that proposed by the Union, which would simply obviate that limitation by interpreting the proviso to "exclude from the prohibition of § 8(b)(4) *all* publicity other than picketing." Union br., p. 3 (emphasis added). Like DeBartolo, "[t]he Board has not read [*N.L.R.B.* v. *Servette, Inc.*, 337 U. S. 46 (1964)] to permit disregarding the producer/distributor language altogether." Bd. br., p. 9. Both the Board and DeBartolo similarly reject the opposite extreme that the requirement must be interpreted literally. Defining the locus on

the spectrum between these two extremes is the critical disagreement. The Board would find the requirement satisfied not only where, as DeBartolo suggests, there is a "unity of interest" between the alleged "producer" and "distributor", but wherever there is an "appeal to customers of a firm that has *some* economic relationship with the primary employer," including all other parties who may "in *some* manner" benefit from that economic relationship. Bd. br., pp. 9, 22 (emphasis added). As shown below, this illusory standard has no basis in either the proviso's language, its legislative history, the consistent interpretation previously adopted by the Board itself, or the objectives intended by Congress when it enacted that provision.

The Board and DeBartolo also apparently agree that certain categories of coercive non-picketing conduct may be constitutionally prohibited. Handbilling or other actions which "contain significant inaccuracies" (Bd. br., p. 34, n. 41), "nonpicketing publicity which induces employee refusals to pick up or deliver goods or to perform services" (Bd. br., p. 30, n. 36), or other conduct apart from picketing which fails to meet the producer-distributor requirement, however that limitation is defined (Bd. br., pp. 9, 39), are all outside the protective ambit of the proviso. Nevertheless, the Board still professes concern that the same prohibition, if applied to appeals not to patronize certain businesses "where the link between those businesses and the employer directly involved in the labor dispute is not equivalent to a 'unity of interest,'" may be "'more extensive than necessary' to serve the relevant governmental interest" and thereby contravene the First Amendment. Bd. br., pp. 47-48. As also demonstrated below, this fear—that the producer-distributor requirement can only pass constitutional muster if given the "some economic relationship/some benefit" reach the Board now suggests—is misplaced.

ARGUMENT

I. A. To determine the parameters of the proviso, "the starting point . . . is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The producer-distributor language of the proviso compels the conclusion that Congress intended to limit the scope of coercive non-picketing publicity. *First*, the term "producer" refers to a limited category of employers because Congress referred elsewhere in Section 8(b)(4) to "producer, processor, or manufacturer, or . . . any other person" when it desired to encompass all employers. In limiting the scope of lawful publicity to "produce[rs]" and "distribut[ors]," Congress embraced a subcategory of that whole. See Pet. br., p. 19, n. 27. *Second*, as this Court observed in *Servette*, at the time the proviso was enacted Congress was familiar with the usage of the term "produced" in existing labor laws. It knew that the term had been given independent significance in, for example, the Fair Labor Standards Act and the War Labor Disputes Act. In contrast to its argument in this case (Bd. br., p. 23, n. 27), in its brief in *Servette* (p. 30), the Board acknowledged that: "Congress was presumably aware of this traditional meaning of the term 'produced' in labor law and intended to incorporate the familiar usage in the proviso rather than some other but wholly unspecified meaning." *Finally*, it bears repeating that, if Congress had intended to permit all publicity, other than picketing, then presumably it would either have expressly said so, or, at the minimum, avoided the "producer" and "distributor" language of the proviso. It was superfluous for Congress to include this restrictive language if it was to have no effect.

B. Although the proviso's legislative history shows that the proviso should be read broadly, nowhere in that legislative history is there any indication that Congress sanctioned all non-

picketing publicity or intended to enmesh in labor disputes the infinite number of secondary employers who would meet the Board's "some economic relationship/some benefit" test.

1. Even assuming, as the Board argues, that there were few "references to secondary consumer-targeted appeals in the hearings and debates prior to the emergence of the final bill from the conference committee" (Bd. br., p. 18), it does not follow that Congress was not concerned about non-picketing consumer boycotts. The Landrum-Griffin bill that was passed in the House and sent to conference prohibited, on its face, *all* types of secondary boycotts. Proponents of that House bill indicated that they fully understood that the bill totally banned secondary boycotts.[1] Two days before the House bill was passed, for example, co-sponsor Representative Griffin, referring to the prohibition of "coercive" secondary boycotts, commented that only where "the handing out [of] handbills or putting an ad in the paper or picketing . . . is done in such a way so as to clearly be nothing more than the exercise of free speech, then the provision would not be violated." II Leg. Hist. 1615 (see columns 2 and 3). In light of this understanding of the scope of prohibited conduct, the relative absence of references to non-picketing consumer boycotts is understandable. The proponents of the House bill naturally focused on the most unscrupulous examples of union secondary activity.

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[1] See, e.g., remarks of Representative Dixon (II Leg. Hist. 1582) ("[W]e need to reinforce the law against secondary boycotts to include a prohibition of coercive acts against the management of innocent companies which are not involved in the labor dispute. This the Landrum-Griffin bill will accomplish."); Representative Lafore (II Leg. Hist. 1588) ("I rise in strong support of the Landrum-Griffin bill, . . . particularly in its effective banning of . . . the secondary boycott."); Representative Robison (II Leg. Hist. 1596-97) ("By adoption of the Landrum-Griffin bill we would outlaw practically all secondary boycotts—a result Congress thought it had accomplished years ago when it passed the Taft-Hartley Act.").

2. The language of the compromise proviso worked out by the conference committee and ultimately enacted into law also demonstrates that Congress was concerned about non-picketing secondary consumer boycotts. The references to a perceived need to preserve freedom of speech (Bd. br., pp. 20-22) reflect a Senate concern that a *complete* ban on non-picketing publicity might violate the First Amendment. The compromise proviso, however, eliminated that concern and insured "that the unions' freedom to appeal to the public for support of their case [would] be safeguarded" (*Servette*, 377 U. S. at 55); all non-picketing publicity calling for a secondary consumer boycott was protected except where it was not truthful, where it resulted in a secondary work stoppage, or where there was no producer-distributor relationship.[2] Indeed, numerous descriptions of the proviso's meaning by House and Senate conferees and non-conferees alike show that the proviso was intended to cover only limited situations. See Pet. br., pp. 14-16.[3] Senator

[2] The Board (br., pp. 26-27) and the Union (br., pp. 3, 17, 19, 21) argue that the proviso must be read in accordance with the First Amendment concerns expressed in *N.L.R.B.* v. *International Association of Machinists, Lodge 942 ("Alloy Manufacturing")*, 263 F. 2d 796 (9th Cir. 1959). We do not disagree. The proviso was enacted into law precisely because, like the court in *Alloy*, Congress was concerned that a ban on all non-picketing boycott publicity might violate the First Amendment. The proviso eliminated these concerns. It specifically sanctioned a broad range of non-picketing consumer boycotts, including the type of boycott activity involved in the *Alloy* case, i.e., a boycott waged directly against the primary employer who is the source of the union's dissatisfaction.

[3] The Board and the Union dismiss these descriptions as "familiar" examples of secondary consumer boycott activity. Bd. br., pp. 22-3; Union br., p. 24. While these descriptions may not have been intended to map the outer boundaries of permissible nonpicketing consumer boycott activity, they do indicate that Congress intended to limit the reach of lawful non-picketing publicity. Surely, if Congress had intended to either sanction all non-picketing publicity, as the Union contends, or to permit virtually all such conduct, as the Board argues, presumably some member of Congress would have said so. The absence of any such statement indicates that Congress had no such intent.

Goldwater, the only conferee and member of Congress who attempted to interpret the meaning of the producer-distributor language, carefully explained that the words "producer" and "distributor" were deliberately inserted into the proviso as words of limitation. II Leg. Hist. 1857. In addition, several years after the enactment of the 1959 amendments, Representative Thompson who, with Senator Kennedy, had criticized the House bill as overbroad and an infringement on free speech (II Leg. Hist. 1708), indicated that the scope of permissible secondary boycott activity under the proviso "is hedged and limited by carefully chosen words of art." 108 Cong. Reg. 9717 (June 5, 1962), and Representative Griffin similarly commented that the words "producer" and "distributor" "spelled out" only a "very limited exception to a general rule." (13 Labor L. J. 355 (May 1962)).

C. The Union nevertheless argues that *Servette* "is dispositive here." Union br., p. 10. The statement relied upon, that "the protection of the proviso was [not] intended to be any narrower in coverage than the prohibition to which it is an exception" (377 U. S. at 55), whether it is considered dicta or not, cannot be construed to mean that the producer-distributor language should be simply ignored. There are, as DeBartolo has already pointed out, major fallacies in this view. Pet. br., pp. 19-20. None of the parties in *Servette* advocated that extreme position. The Board's contention was much narrower: the thrust of its position was that a union should be allowed "to exercise its traditional rights to follow down to the retail level products which are handled at any stage in the course of manufacture and distribution by an employer who fails to conform to what the union regards as fair employment practices." Bd. brief in *Servette*, pp. 32-33. The Board expressly noted that the proviso would not permit the union "to spread the labor dispute more widely through the community." *Id.* at 33. The Board's position was consistent with its reading of the "familiar meaning" of the "term 'produced' . . . in the area of

labor law" (*ibid.*) as well as its first post-amendment decision, *International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961), an opinion cited with approval in *Servette* (377 U. S. at 55).[4] Moreover, every Board and court decision subsequent to *Lohman* similarly analyzed the facts to determine if the requisite producer-distributor relationship was present, and the Board has likewise acknowledged in its brief (p. 9) that *Servette* should not be read to "permit disregarding the producer/distributor language altogether."

D. As DeBartolo has demonstrated (Pet. br., p. 13), Congress intended to limit the proviso's reach to those employers who have a "unity of interest" (*Goldfinger* v. *Feintuch*, 276 N. Y. 281, 287, 11 N. E. 2d 910, 913 (1937)) with the primary employer. By 1959, the "unity of interest" test was widely recognized and extensively cited by both New York courts and the courts of other jurisdictions.[5] Commentators during this

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[4] *Lohman* never suggested that the producer-distributor limitation was coextensive with the language of the prohibition. To the contrary, the Board carefully analyzed that requirement in light of "other parts or sections [of the statute] so as to produce a harmonious whole," the "natural meaning" of those terms as defined by *Webster's* and *Black's Law Dictionary*, the statute's legislative history, and the "accepted interpretation" of the words "product" and "produced," and concluded only that an employer "need not be the actual manufacturer to add his labor in the form of capital, enterprise, and service" to become one of the "producers" of a "product." 132 NLRB at 906-08. Significantly, even this view was severely criticized by a dissenting Board member who, apparently not prescient of the Union's position here, claimed that "[b]y giving the broadest possible reading to the phrase 'products . . . produced,' my colleagues are administratively reversing . . . [the] congressional purpose, and are, therefore, failing to give effect to the basic aims of Section 8(b)(4)." *Id.* at 913.

[5] See, e.g., *International Brotherhood of Teamsters* v. *Blasingame*, 293 S. W. 2d 444 (Ark. Sup. Ct. 1956); *Milwaukee Boston Store* v. *American Federation of Houseworkers*, 269 Wisc. 338, 69

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period had referred to it as "now-famous"[6] and a "case which has won wide-spread attention."[7] During the legislative debates Senator Morse quoted from *Goldfinger* on two occasions,[8] and he referred to the "unity of interest" doctrine as "great language."[9] Numerous other descriptions of the proviso's meaning that were proffered during the debates also followed a "unity of interest" approach. Pet. br., pp. 13-16.

Significantly, in *Servette* the Board itself proposed a "unity of interest" test. In its principal brief (p. 11), the Board, citing *Goldfinger* with approval, stated: "[C]onstruing 'produced' in the proviso to encompass the operations of a distributor like Servette is in accord with the familiar common law 'unity of interest' doctrine which holds that a labor union has a justifiable interest in following down to the retail level products which are handled at any stage of manufacture and distribution by an employer who fails to conform to what the union regards as fair employment standards." The Board further argued that

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N. W. 2d 762 (1955); *Galler* v. *Swirzberg*, 27 N. J. Super. 139, 99 A. 2d 164 (1953); *Pedigo* v. *Celanese Corp. of America*; 205 Ga. 392, 54 S. E. 2d 252 (1949); *International Brotherhood of Teamsters* v. *Missouri Pacific Frt. Tr. Co.*, 220 S. W. 2d 219 (Tex. Ct. Civ. App. 1949); *Rogers* v. *Poteet*, 199 S. W. 2d 378 (Mo. Sup. Ct. 1947); *Mason and Dixon Lines* v. *Odom*, 18 S. E. 2d 841 (Ga. Sup. Ct. 1942); *Kingston Trap Rock Co.* v. *International Union of Operating Engineers*, 129 N. J. Eq. 570, 19 A. 2d 661 (1941); *Alliance Auto Services, Inc.* v. *Cohen*, 19 A. 2d 152 (Pa. Sup. Ct. 1941); *Johnson* v. *Milk Drivers*, 195 So. 791 (La. Ct. App. 1940); *Fortenbury* v. *Superior Court*, 106 P. 2d 411 (Cal. Sup. Ct. 1940); *Lyle* v. *Loyal 452*, 124 S. W. 2d 701 (Tenn. Sup. Ct. 1939); *Weist* v. *Dirks*, 20 N. E. 2d 969 (Ind. Sup. Ct. 1939).

[6] Koversky, *A Social and Legal Analysis of the Secondary Boycott*, 35 Or. L. Rev. 71, 108 (1956).

[7] Cushman, *Secondary Boycotts And The Taft-Hartley Law*, 6 Syracuse L. Rev. 109 (1955); see also Meyer, *Ally Or Neutral —Secondary Boycott Dilemma*, 34 Tul. L. Rev. 343, 345 (1960).

[8] II Leg. Hist. 1426-1427 (Sept. 3, 1959).

[9] II Leg. Hist. 1427.

this construction of the proviso "would permit a labor union to follow an 'unfair' product but not to spread the labor dispute more widely through the community by putting pressure *upon any firm that had any form of business relations* with a firm engaged in a labor dispute." *Id.* at 32-33 (emphasis added). Relying on both *Goldfinger* and the remarks of Senator Morse, the Board noted (*id.* at 33) that "[t]his distinction was well known in labor law and was before the Congress which passed the 1959 amendments." Thus, in *Servette* the Board rejected the very "some economic relationship/some benefit" criterion it now proposes. Instead, it argued in favor of a "unity of interest" test. The Board offers no explanation for this belated change in position.[10]

A unity of interest standard broadly protects a union's ability to engage in non-picketing publicity. The test recognizes that, functionally, those businesses which participate in the production, distribution, and sale of a product represent successive stages of an integrated enterprise. The interests of the employers in that chain of production are aligned. As a result, if a union pressures the secondary establishments, it may enhance its position *vis-a-vis* the primary employer because the secondaries can cease or threaten to cease doing business with the primary. A unity of interest standard thus realistically takes into consideration the primary's dependence on the secondary in maintaining the conditions considered unfair by the union.

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[10] The Board asserts that *Goldfinger* is only relevant "to Congress' intent respecting restrictions on picketing" (Bd. br., pp. 22-23, n. 26). That assertion is incorrect. Senator Morse had argued that the "unity of interest" doctrine should be extended to *all* consumer boycott activity, including picketing, because "[i]t is not enough to say that the union can make its appeal by newspaper advertisements and leaflet distribution." Senator Morse apparently assumed that, under the language of the conference committee compromise, the "unity of interest" test already governed the scope of lawful non-picketing consumer boycott publicity. II Leg. Hist. 1427.

By comparison, the Board's proposed test is an amorphous and unrealistic alternative. It would enmesh in a labor dispute all employers who have "some economic relationship" with the primary employer or who "in some manner" may somehow benefit from that relationship, regardless of either the nature of that relationship or the secondary's ability, if any, to exert any leverage against the primary. As described in DeBartolo's principal brief (pp. 26-28), this approach would widen industrial strife to encompass innumerable neutral employers whom Congress sought to insulate from the devastating effects of a secondary boycott.[11]

The instant case is illustrative. Neither DeBartolo, nor the tenants other than Wilson's, did business with High.[12] A

[11] To dispel the pernicious consequences of its proposed test, the Board asserts that "a union would have little or no incentive to distribute truthful publicity explaining why it is asking the public to withhold patronage from businesses whose relationships to the allegedly unfair employer are limited, for example, to being situated on the same block as a secondary employer that does business with the primary." Bd. br., pp. 39-40. The Board reasons that "such businesses have little leverage with respect to the matters concerned in the primary labor dispute, . . . [and] the union's message to the public would simply not be very persuasive." *Id.* at 40. This reasoning directly contradicts the Board's own "some economic relationship/some benefit" test. That test would enmesh neutrals in a labor dispute irrespective of the amount of leverage, if any, possessed by the neutral or whether a message addressed to their customers would be "very persuasive."

[12] The Board's "mutually dependent and beneficial relationship" characterization of this case improperly relies upon the alleged "common location . . . cost-sharing and profit-sharing relationships, as well as petitioner's potential control of construction work on the mall property." Bd. br., p. 39. *First*, the Board ignores the crucial fact that High was not a tenant of DeBartolo nor did it have any business relationship with DeBartolo. *Second*, the Board's assertion that DeBartolo shares in its tenants' profits is erroneous. Profits are typically shared by partners in a common business enterprise. DeBar-

(*Footnote continued on following page.*)

consumer boycott of DeBartolo and the tenants other than Wilson's cannot influence either High's labor policies or encourage the tenants to cease or threaten to cease doing business with High because these secondary employers lie outside High's chain of production. The tenants other than Wilson's were therefore faced with losing sales and laying off employees in a context where they could not effectively influence the resolution

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tolo, by contrast, charges the tenants a minimum rent plus an additional percentage rent based on gross sales as opposed to net profits. J. A., p. 67a.

The relationship between DeBartolo and the tenants is also neither unique nor unusual. A "percentage lease is a standard real estate instrument in most retail areas." S. McMichael and P. O'Keefe, *Leases: Percentage, Short and Long Term*, p. 34 (5th ed. 1959). Franchising arrangements are also typically characterized by a percentage payment by the franchisee based on gross sales. H. Brown, *Franchising: Realities and Remedies*, pp. 1-6 (Rev. ed. 1981). The sharing of costs, including maintenance and advertising costs, is commonplace among retailers located in the same geographic area as well as the tenants of shopping centers, office buildings, industrial parks, and large loft and manufacturing buildings. See, e.g., McMichael and O'Keefe, *supra*. Franchisees similarly "contribute directly to the cash outlay for advertising." Brown, *supra*, p. 1-13. Finally, landlords typically retain the right to exercise construction control, including "supervision and approval" of construction activity, on demised premises. McMichael and O'Keefe, *supra*, p. 29. With respect to franchising arrangements the degree of control over the franchisee is, of course, even more pervasive. The franchisor imposes "uniformity of product," controls the product's "quality and distribution" (*Susser* v. *Carvel Corp.*, 206 F. Supp. 636, 640 (S. D. N. Y. 1962)), and exercises psychological control over the franchisee grounded in training courses, refresher courses, manuals, and supervision. Brown, *supra*, pp. 1-5.

Accordingly, the Board's attempt to categorize the "fears expressed by petitioner . . . and its supporting amici" as "exaggerated" and "no basis for rejecting the Board's ruling in this case" (Bd. br., p. 39) is meritless. To repeat, for the reasons described in DeBartolo's principal brief, the ramifications of the decision below are both far-reaching and nonsensical. Pet. br., pp. 26-28.

of the underlying labor dispute.[13] They had no "unity of interest" whatsoever in the underlying dispute between High and the Union. Contrary to the basic purpose of the 1959 amendments to the Act to curtail secondary activity, the Board's new "some economic relationship/some benefit" test would embroil those unrelated secondaries in that dispute.

II. The Board asserts that "Petitioner's reading of Section 8(b)(4), including its proviso ... raises difficult questions respecting the First Amendment." Bd. br., pp. 41-42. This concern is predicated upon three assumptions: (1) that only non-coercive communication is at issue in this case (Bd. br., p. 44); (2) that only "the content of a message that is communicated ... to members of the public" is involved (Bd. br., p. 44); and (3) that DeBartolo "seeks to construe the proviso as barring the Union's message altogether." Bd. br., p. 43, n. 48. All of these assumptions are incorrect.

A. While the Board claims that the "question whether the handbilling here would constitute 'coercion' ... was not decided by the Board" (Bd. br., p. 13, n. 14), as Petitioner has demonstrated (Pet. br., p. 9, n. 8), such a finding was implicit

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[13] The Board claims that DeBartolo could exert influence over Wilson's because of "its own ability to request Wilson's to seek to ensure that High pay wages and benefits meeting area standards." Bd. br, pp. 40-41, n. 45. While any party could conceivably "request" Wilson's or High to change their labor policies, the potential success of such a request is speculative, particularly if it emanates from a minor tenant who may even be a potential competitor of Wilson's. See Pet. br., p. 26, n. 37. As for the Board's other proposal (Bd. br., p. 41, n. 45) that DeBartolo insure that "all construction at the Mall will be done using contractors who pay their employees fair wages and benefits," the suggestion that DeBartolo must require that the contractors of its tenants have union contracts as a condition of their leases raises serious antitrust concerns. See, e.g., *Associated General Contractors of California, Inc.* v. *Calif. State Council of Carpenters*, ____ U. S. ____, 112 LRRM 2753, 2756 (Feb. 22, 1983); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Union No. 100*, 421 U. S. 616 (1975).

in the Board's determination, that, but for the proviso's protection, the instant handbilling would violate Section 8(b)(4)(ii)(B) of the Act. That Section requires there to be "threat[s], coerc[ion], or restrain[t]" as a prerequisite to a violation; absent those elements, there would be no unlawful act and, hence, no need to have addressed the proviso.[14]

Both the Board and the Union also argue that the coercion here was somehow obviated because the Union's message was purportedly directed at the "general public" rather than solely at union members subject to discipline, or by reason of the utilization of handbilling in contrast to picketing. Bd. br., pp. 42-44; Union br., pp. 44-47. These contentions disregard the overriding consideration in this case: the Union did not confine its message to the simple communication of information about a labor dispute or merely seek to "advise the public." Bd. br., p. 33. If the Union had so limited its actions, the distribution of the handbills would not have been coercive. Instead, the Union went further and engaged in economic action against DeBartolo and the tenants; by advocating a consumer boycott of these secondary employers the Union transcended from the area of protected speech into that of coercive conduct. It may be true, of course, that, if the Union had directed its message to union members, engaged in picketing, or chosen various other pressure tactics, such coercion could have resulted in more injury to neutral employers. The Act, however, does not draw distinctions between degrees of coercion. For purposes of Section 8(b)(4), if the conduct at issue, "whether it be by picketing or

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[14] See, e.g., both the majority and dissenting opinions in *Lohman*, 132 NLRB at 904 and 910, as well as the other cases discussed at p. 9, n. 8, of DeBartolo's principal brief. See also the Board's petition for certiorari in *Servette*, p. 12 ("Distributing handbills outside a retail store requesting potential customers not to purchase the goods of a particular supplier, like Servette, would be an unfair labor practice under Section 8(b)(4)(ii) because the union would be coercing or restraining the retailer with the object of forcing it to cease dealing in the products of the supplier, if it were not for the final proviso.").

otherwise" (*N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local No. 760 ("Tree Fruits")*, 377 U. S. 58, 68 (1964)), threatens, coerces or restrains, it may constitutionally be regulated.

B. The Board also asserts that a prohibition of the instant handbilling would improperly constitute a prohibition "directed solely at the content of a message." Bd. br., p. 44. As shown above, the Union here engaged in more than merely publicizing its dispute—it engaged in economic action to achieve the admitted "effect that Congress has a substantial interest in preventing, namely, a neutral employer's coerced participation in an industrial dispute." Bd. br., p. 46. Indeed, the Board itself has previously advocated this very distinction before this Court. In *United Steelworkers* v. *Solien, cert. denied,* 444 U. S. 828 (1979), the Board's brief in opposition (p. 14) argued that the Act did not impermissibly violate the "First Amendment by prohibiting the distribution of handbills and the publication of newspaper advertisements that call for a secondary boycott of a neutral employer." As the Board emphasized, "[u]nion-sponsored publicity that specifically calls for economic action against a neutral employer does more than merely 'disseminate information' or simply express the union's view regarding the merits of the dispute. It is economic action that may be constitutionally regulated by Congress through its plenary power to regulate and promote interstate commerce." *Id.* at 15.

The prohibition in this case, like that in *United States* v. *O'Brien,* 391 U. S. 367 (1968), is "in no way aimed at suppressing communication." Bd. br., p. 45. The Union, to repeat, was free to communicate the facts of its labor dispute by a variety of methods which even included some permissible coercive secondary activity. See Pet. br., p. 31. It was not free to couple that communicative activity with "non-speech" activity designed to unlawfully coerce neutral employees; that is the "substantive evil condemned by Congress in § 8(b)(4)." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*,

341 U. S. 694, 705 (1951). Congress' judgment that certain coercive activity prohibited by Section 8(b)(4) is entitled to less "consideration under the First Amendment" (*International Longshoremen Association* v. *Allied International, Inc.*, ___ U. S. ___, 72 L. Ed. 2d 21, 32 (1982)) should be respected.

Besides, as the Board acknowledges, "the constitutional rule barring content-based regulations of speech is not fully applicable in the labor context." Bd. br., pp. 44-45. Neither *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972), nor *Carey* v. *Brown*, 447 U. S. 455 (1980), held that governmental interests can never justify the regulation of communicative activity. As recognized in *Mosley*, "under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions." 408 U. S. at 98. See also *Perry Education Ass'n.* v. *Perry Educators Ass'n.*, ___ U. S. ___, 112 LRRM 2766, 2770 (Feb. 23, 1983). There is, as the Board concedes, such a "substantial [government] interest in prohibiting secondary boycotts." Bd. br., p. 47. Moreover, in enacting Section 8(b)(4), Congress limited the Act's prohibitions to address only "isolated evils." *Tree Fruits*, 477 U. S. at 71.[15] Both *Mosley* and *Carey*, therefore, constitutionally permit the regulation of coercive handbilling that is integral to "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees and consumers to remain free from coerced participation in industrial strife." *N.A.A.C.P.* v. *Claiborne Hardware Co.*, ___ U. S. ___, 73 L. Ed. 2d 1215, 1236 (1982); *N.L.R.B.* v. *Retail Store Employee Union, Local 1001*, 447 U. S. 607, 617-18 (1980) (Blackmun, J., concurring).[16]

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[15] The Act's prohibitions, as Justice Frankfurter noted in *Local 1976, Carpenters v. N.L.R.B.*, 357 U.S. 93, 98 (1958), neither have a "sweeping prohibition" against, nor "speak generally of secondary boycotts." Rather, the prohibition "describes and condemns specific union conduct directed to specific objectives." *Ibid.*

[16] To the extent the Union denigrates this substantial government interest in regulating secondary boycotts, it seeks to divorce the instant

(Footnote continued on following page.)

C. Having conceded that the "asserted governmental interest is substantial" (*Central Hudson Gas & Electric Corp.* v. *Public Service Comm.*, 447 U. S. 557, 566 (1980)), the Board contends that the critical issue then becomes whether the Act's prohibition is "narrowly drawn" (*id.* at 465), or, as the Board frames the issue, " 'more extensive than necessary' to serve the relevant governmental interest." Bd. br., p. 47. The Board's concern stems from its mistaken belief that, if DeBartolo's position is accepted, all communication of the Union's message would be barred. Bd. br., p. 43, n. 48. DeBartolo, however, does not controvert the Union's right to coercively handbill either High, Wilson's, or any other party having a "unity of interest" with the underlying controversy, or to non-coercively publicize its dispute in any way it may desire. Pet. br., p. 31. The limited restriction imposed on certain coercive activity amply "leaves open to the [Union] other traditional modes of communication." *Carpenters and Joiners, Local No. 213* v. *Ritter's Cafe*, 315 U. S. 722, 727-28 (1942). The Act permits a wide range of alternative communicative activity which, in Congress' judgment, has a less devastating impact on interstate commerce.

(Footnote continued from preceding page.)

case from its labor relations context. *Organization For A Better Austin* v. *Keefe*, 402 U. S. 415 (1971), which the Union suggests is the "governing precedent" (Union br., p. 35), does not hold that no governmental interest may justify the regulation of handbilling, merely that the asserted "interest" there at issue, *i.e.*, "the interest of an individual in being free from public criticism of his business practices" (402 U. S. at 419) was, by itself, insufficient to warrant such regulation. In contrast, in this case the counterbalancing interest is not, as it was in *Keefe*, the private interest of a business to avoid embarrassment, but, rather, the broader public interest to minimize the disruption of and avoid impediments to interstate commerce.

CONCLUSION

For all of the foregoing reasons, as well as the reasons contained in Petitioner's principal brief, it is respectfully requested that the judgment of the Court of Appeals be reversed and that this case be remanded to that Court with instructions to deny enforcement of the Board's order and to remand the case to the Board for entry of an appropriate remedial order.

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No. 81-1985

In the Supreme Court of the United States

October Term, 1982

THE EDWARD J. DEBARTOLO CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE, AMERICAN RETAIL FEDERATION, IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE, AMERICAN RETAIL FEDERATION, IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Retail Federation ("Federation") is made up of 33 national associations and 50 state associations of retailers, representing, through these member associations, 1,500,000 retailers. These retailers range from large, multi-unit enterprises to corner markets and small variety stores and employ approximately 14,000,000 people.

Thus, the Federation is in a unique position to express the interests of this very important segment of the national economy.

The Federation regularly represents the interests of its member-employers in important labor relations matters. It concerns itself with national issues and problems affecting retailers and has sought to advance the interests of these retailers by participating in a wide range of labor relations cases before this Court and other courts and in testimony before Congress involving labor legislation.

The specific issue presented in this case is whether, despite the producer-distributor requirement of the publicity proviso of Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4), a union may handbill urging a total consumer boycott of all the neutral tenants of a shopping center and the neutral owner of a center simply because the union has a labor dispute with the contractor of one of the other tenants.

Many of the Federation's members are shopping center tenants. By and large they are independent, autonomous enterprises. The decision of the Court of Appeals in this case permits coercive secondary activity by the union against neutral retailers for the sole reason that another tenant may be involved with a contractor who may have a dispute with the union. As a result, these neutral retailers will be enmeshed in labor disputes over which they have absolutely no control or influence. Furthermore, the decision of the court below will no doubt be read to permit secondary activity against innocent, uninvolved retailers in other contexts. The impact of the decision will be felt by countless retailers and thus this case warrants the participation of the Federation on behalf of its members.

SUMMARY OF ARGUMENT

The secondary boycott provisions of the National Labor Relations Act evidence Congress's overriding concern for the protection of neutral, innocent employers from being enmeshed in labor disputes not their own. When Congress enacted the publicity proviso to Section 8(b)(4) of the Act it intended to permit secondary activity only in certain limited circumstances. The National Labor Relations Board, in a series of cases culminating in the case before this Court, has steadily expanded its interpretation of the limiting language of the proviso so as to render it meaningless. The Board has ignored cardinal rules of statutory construction and the carefully reasoned decision of this Court in the leading case construing the publicity proviso. The result is the anomalous decision in this case and the prospect of further unwarranted extension of secondary activity to circumstances far beyond the contemplation of the framers of the statute.

ARGUMENT

I. Introduction.

In this case, a divided panel of the Court of Appeals for the Fourth Circuit denied the Edward J. DeBartolo Corporation's petition to set aside an order of a divided panel of the National Labor Relations Board ("Board") (A. 1-18).[1] The Board, one member dissenting, dismissed

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1. The text of the Fourth Circuit's decision, *Edward J. DeBartolo Corp. v. N.L.R.B.*, 662 F.2d 264 (4th Cir. 1981) and the text of the underlying Board decision, *Florida Gulf Coast Building Trades Counsel, AFL-CIO (DeBartolo)*, 252 NLRB 702 (1980), are reprinted in full in the Appendix to Petition for Writ of Certiorari and are cited herein as "A."

DeBartolo's complaint alleging that handbilling, which urged a total consumer boycott of a shopping center and all stores therein, was an unfair labor practice (A. 19-30). The handbilling grew out of a dispute between a labor organization and the contractor engaged by a new tenant to build a department store that would connect with and become a part of a mall owned by DeBartolo (A. 2). The Board and court majority held that the publicity proviso to Section 8(b)(4) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b)(4), protected the handbilling. The proviso protects truthful publicity that advises the public "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer."

The Board had found the relationship between DeBartolo and all the tenants "symbiotic in nature" and, from the standard language of the tenants' leases, found interdependence and a mutually beneficial relationship. The Fourth Circuit affirmed (A. 7).

The Fourth Circuit determined that the producer-distributor requirement of the proviso had been met under the following rationale: The contractor (with whom the labor organization had a primary dispute) was a producer of the new department store as well as the entire mall enterprise, and DeBartolo and all of the mall's other tenants were distributors of both these "products" (A. 7-8).

As we show below, the majority of the court and the Board gave the producer-distributor requirement an overly broad interpretation that protects secondary activity even when there is "no direct connection between the primary employer and the handbilled employer" (A. 12). As the dissenting judge noted, this interpretation is "totally at odds with any normal interpretation of the word 'produce'" (A. 18).

II. Neither The Legislative History Of Section 8(b)(4) Of The Act Nor The Supreme Court Decision In *N.L.R.B. v. Servette, Inc.*,[2] Support The Decision Of The Board Or The Court Of Appeals In This Case.

In 1947 Congress outlawed the secondary boycott, declaring it to be an unfair labor practice in violation of Section 8(b)(4)(A) of the Taft-Hartley Act. The secondary boycott was condemned because it was thought unfairly to enmesh in a proliferating dispute a person who was in truth a neutral, a stranger to that dispute. Two forms of pressure on neutral employees were not, however, outlawed by the 1947 Taft-Hartley Act: (1) direct coercion of the neutral by threats and other means short of an actual work stoppage by the neutral's employees, and (2) appeals to customers of a secondary employer to cease patronizing that employer. These loopholes were meant to be plugged by Congress in 1959 when it added subsection (ii) to 8(b)(4)[3] declaring it illegal for a labor organization with a secondary object to "threaten, coerce, or restrain any person engaged in commerce."

The House bill that eventually formed the heart of the legislation contained the language that presently exists in Section 8(b)(4)(ii)(B) and was understood to prohibit all secondary boycotts of neutral employers, including consumer boycotts.

The Senate was concerned that the House language, standing alone, would prohibit a union from publicizing

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2. 377 U.S. 46 (1964).

3. *See, e.g.*, Remarks of Senator McClellan, 105 Cong. Rec. 3951 (March 12, 1959), II Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (hereinafter Leg. Hist.) 1007; Remarks of Congressman Lafore, 105 Cong. Rec. 3928 (March 11, 1959), II Leg. Hist. 1471.

the fact that a merchant dealt in "struck goods"[4] or products made elsewhere "under racket or sweatshop conditions."[5] As a result, the publicity proviso was passed. It was designed to permit handbilling and other forms of publicity directed toward secondary employers but only under very limited circumstances:

> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraphs shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, ...

The proviso does not permit unrestrained coercive publicity, but rather regulates it. In addition to terms relating to the purpose and effect of such publicity, the terms "products," "produced," and "distributed" limit the circumstances in which such publicity is permitted. The latter terms reflect the language used in examples in Congressional debate, examples inevitably based on the commonly recognized meaning of the terms.[6]

As this Court has observed, Congress was undoubtedly familiar with the term "produced" as used in other contexts.[7] Had Congress intended to permit a handbilling-

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7. *N.L.R.B. v. Servette, Inc.*, 377 U.S. at 55.

4. Remarks of Senator Humphrey, 105 Cong. Rec. 6232 (April 17, 1959), II Leg. Hist. 1037.

5. Remarks of Senator John Kennedy, 105 Cong. Rec. 16414 (Sept. 3, 1959), II Leg. Hist. 1432.

6. *See, e.g.*, Remarks of Senator Humphrey, *supra*, note 4 ("struck product"); Remarks of Senator Kennedy, *supra*, note 5 ("goods made by non-union labor"); Remarks of Senator Morse, 105 Cong. Rec. 17882 (Sept. 3, 1959), II Leg. Hist. 1426 (shoes manufactured by a struck employer distributed by a department store).

type boycott of a neutral employer having any relationship at all, however attenuated, to employers with whom a union has a labor dispute, it could have said so and used broader language than that adopted in the proviso.

Shortly after passage of the amendment, the Board had its first opportunity to consider a definition of the word "produce" as used in the proviso. While it was undisputed that a union could publicize that an otherwise neutral employer sold goods manufactured by an employer with whom the union had a dispute, the critical question was whether it was permissible for the union to publicize that a neutral retailer sold goods "handled" by a wholesaler involved in a primary labor dispute. In other words, was a wholesaler a "producer" within the meaning of the proviso? In its *Lohman Sales*[8] decision the Board held that it was.

Finding that the term "producer" need not be restricted to one who "physically engenders" a "material object," the Board held that "*labor* is the prime requisite of one who produces. A wholesaler, such as Lohman, [who] add[s] his labor . . . to the product he furnishes the retailers . . ., is one of the producers of the cigarettes distributed to his customers."[9]

In *N.L.R.B. v. Servette,* this Court, while approving the Board's *Lohman Sales* ruling that products "produced by an employer" include products distributed by a wholesaler, carefully grounded its holding in an analogy to the use of the term "produced" in the Fair Labor Standards Act and cases construing it.[10]

We have no quarrel with *Lohman Sales* or *Servette.* These cases recognized the limiting language of the proviso

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8. *Milk Drivers & Dairy Employees Local 537 (Lohman Sales)*, 132 NLRB 901 (1961).

9. *Id.* at 907 (emphasis in original).

10. 377 U.S. at 55.

and interpreted that language in a manner consistent with cardinal rules of statutory construction.[11]

The legislative history of Section 8(b)(4) and the proviso supports in interpretation of the terms "product," "produced," and "distributed" in accordance with ordinary, dictionary definitions, as does this Court's analogy to the Fair Labor Standards Act. However, neither the legislative history nor this Court's *Servette* decision supports the tenuous extension of the terms "product," "produced," and "distributed" to the facts in this case.

III. The Board Has In A Series Of Cases Culminating In *DeBartolo*, Steadily Expanded The Reading Of The Publicity Proviso So As To Render The Limiting Language Meaningless.

A year after its *Lohman Sales* decision, the Board again considered the proviso. *Middle South Broadcasting*[12] involved a handbilling boycott of automobile dealers who

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11. In a recent case, *Hospital and Service Employees Union (Delta Air Lines)*, 263 NLRB No. 153 (Sept. 10, 1982), the Board showed itself capable of careful attention to other limiting language ("for the purpose of") of the proviso and to the rules of statutory construction. Member Jenkins, in a section of his partial dissent adopted by the Board majority (slip. op. at 9, fn. 9), criticizing Member Zimmerman for the very kind of reasoning the Board employed in *DeBartolo*, noted that it is "an elementary canon of statutory interpretation that each word in a statute will be presumed to be meaningful and to have been purposely included. . . .

"It would surely be incongruous not to read the words 'publicity . . . for the purpose of' as similarly stating a requirement for inclusion within the proviso; specifically, imposing a requirement that the publicity be presented for the purpose of advising that a product is produced by an employer with which a union has a labor dispute and is distributed by another employer." Slip. op. at 21-23.

So here, the terms, "product," "produced," and "distributed" must be presumed to be meaningful and to have been purposely included.

12. *Local 662, Radio and Television Engineers (Middle South Broadcasting)*, 133 NLRB 1698 (1962).

advertised on a radio station operated by an employer with whom the union had a primary dispute. The union campaign asked customers to boycott the dealers.

Using the analysis that it had developed in *Lohman Sales*, the Board held that:

> The primary employer radio station, by adding its labor in the form of capital, enterprise and service to the automobiles which it advertises for the secondary employer retail distributor of the automobiles, becomes one of the producers of the automobiles. . . . And, of course the secondary employer retail distributor of the automobiles clearly "distributes" such product within the meaning of the proviso.[13]

Two years later, in a similar case involving television advertising, the Board held that the television station "by the addition of its services (advertising) to the products [sold by the advertisers], is a 'producer' within the meaning of the proviso."[14] However, in what was clearly an overbroad extension of its *Lohman Sales* holding, the Board added "that 'producer' as used in the proviso, encompasses anyone who enhances the economic value of the product ultimately sold or consumed; i.e., for the purposes of the proviso, no distinction is drawn between processors, distributors and those applying services."[15] Thus the definition of producers was gratuitously interpreted to include providers of services who did not handle a tangible good.

The Board, having taken these first steps, embarked on an expansionist course, either stretching the statute's terms—products, produced, distributed—to the breaking

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13. *Id.* at 1705.

14. *American Federation of Television and Radio Artists, San Francisco Local (Great Western Broadcasting)*, 150 NLRB 467, 472 (1964).

15. *Id.*

point or, sometimes, ignoring them altogether, as it did in *Local Union No. 54, Sheet Metal Workers, (Sakowitz)*:[16]

> The proviso to Section 8 (b)(4) authorizes publicity other than picketing which persuades customers of a secondary employer to stop trading with him except to the extent that such publicity has the effect of cutting off his deliveries or inducing his employees to cease work.[17]

Thus, the Board disregarded the limiting language of the proviso and flouted the very language which this Court took pains to interpret logically and reasonably in *Servette*.

In 1979, the Board adhered to its expanded interpretation of the publicity proviso in *United Steelworkers of America (Pet, Inc.)*.[18] Pet, Inc. was a billion-dollar, diversified conglomerate. In late 1977, the Steelworkers Union representing striking employees at Hussmann Refrigerator Company, a Pet subsidiary, attempted to organize a consumer boycott of all Pet products and other subsidiaries which operated retail stores. The boycott did not differentiate between Pet subsidiaries that purchased products from Hussmann and those that did not. The General Counsel argued on Pet's behalf that the publicity was in violation of Section 8(b)(4) because it had the illegal object of causing a cessation of business among Pet divisions and subsidiaries and between Pet and its customers, suppliers and distributors and was not protected by the proviso.

The Board, declining to decide whether the Steelworkers' publicity efforts violated Section 8(b)(4)(ii)(B), held that the subsidiary was a "producer of all Pet enter-

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16. 174 NLRB 362 (1969).
17. *Id.* at 363.
18. 244 NLRB 96 (1979).

prises products in the sense that 'producer' is used in the proviso. . . ."[19] The Board concluded that prior cases (by its own interpretation) allowed a union to "lawfully urge, via handbilling or other non-picketing publicity, a total consumer boycott of a neutral employer, so long as the primary employer has at some stage produced, in the sense of applying capital, enterprise, or service, a product of the neutral employer."[20] It then held that Hussmann met this test by contributing diversification, actual or potential profits, and "a measure of goodwill" to the rest of the conglomerate.

What the Board did in *Pet* was finally to create a new definition of the term "producer." The Board extracted a phrase from its *Great Western* decision out of context, combined it with an abbreviated version of its *Lohman Sales* definition and discovered that a "producer" is any employer who can conceivably apply capital, enterprise or service in any manner that theoretically may enhance the value of another employer's enterprise.[21]

Here, in 1980, in *DeBartolo* the Board issued a decision which rendered the limiting language of the proviso meaningless. The Board rested this decision on the standard tenant lease terms, finding in them a "symbiotic" relationship between DeBartolo and its tenants, not unlike the relationship between a subsidiary and its conglomerate parent it had found in *Pet*. It held that the publicity proviso

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19. *Id.* at 102.

20. *Id.* at 101.

21. The Court of Appeals reversed, refusing to approve the Board's unreasonable interpretation of the word "produce." The Court could not say, as the Board had, that "because Hussmann's profits inure to the benefit of Pet, Hussmann produces Pet's products." The connection between Pet's products and Hussmann was "too highly attenuated" for the Court to permit use of the publicity proviso. *Pet, Inc. v. N.L.R.B.*, 641 F.2d 545, 549 (8th Cir. 1981).

protected the secondary activity because the primary employer, the contractor hired to build a department store, was a producer of a product (the entire mall enterprise) which was distributed by all the mall tenants and the mall owner.

The majority of a panel of the Court of Appeals for the Fourth Circuit approved the Board's decision. Judge Britt, in his dissent, found the Court's construction of the statute "strained" (A. 18), patently depriving the limiting language of the proviso of any meaning at all. To say that a contractor engaged to build one store in a shopping mall is a "producer" of the "entire mall itself" is sophistry. Furthermore, the other shopping mall tenants do not "distribute" the mall enterprise but are truly neutral.[22] They distribute consumer products, which are not produced by the primary employer but rather by other neutral, innocent employers.

IV. The Board's Reading Of The Publicity Proviso, If Left Unchecked, Threatens To Enmesh Truly Neutral Employers, Having No Nexus With A Primary Employer, In Labor Disputes.

It is clear that the framers of Section 8(b)(4) intended to outlaw secondary boycotts. As Senator Taft stated:

> [U]nder the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or

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22. In other contexts, the Board has concluded that tenants of a shopping center other than the primary employer tenant are neutral and the Board has sought to insulate them from activity directed at the primary employer. *Giant Food Markets, Inc.*, 241 NLRB 727, 729 (1979) ("Another factor to be taken into account is the likelihood of a union's picketing enmeshing neutral employees in its dispute with a particular store in a shopping center."); *Scott Hudgens*, 230 NLRB 414, 417 (1977) ("[W]e find merit in the General Counsel's contentions that . . . the likelihood of enmeshing neutral employers . . . weigh[s] against requiring pickets to remove to . . ." the location urged.).

> any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondary boycotts to make them an unfair labor practice.[23]

Congress believed the pressure of a secondary boycott should be outlawed because it is directed at neutral, innocent employers who are themselves powerless to resolve the union's dispute with the primary employer.[24]

By losing sight of the purpose of the statute and engaging in semantic games with the limiting language of the proviso, the Board has opened the door to anomalous results, far from the contemplation of the Congress. For example, in *Pet,* the Board analysis suggests that the subsidiary's chief tangible benefit derived from membership in the conglomerate was that the conglomerate served as the subsidiary's bank. Thus, a union involved in a primary dispute with any bank's borrower could publicize the ex-

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23. Legislative History of the Labor Management Relations Act, 1947, 1106.

24. The Board itself has recognized this: ". . . Section 8(b)(4) was enacted primarily because Congress believed that neutral (secondary) employers should be protected from being involved in labor disputes not their own—and similarly that a union's ability to enmesh neutrals in other employers' labor disputes should be limited *as much as possible.*" *Delta Air Lines, supra* note 11, at 9 (emphasis added).

The importance of giving effect to Congressional intent in safeguarding neutrals from secondary pressures was recently demonstrated by this Court, particularly where the destructive activity is imposed on a neutral employer who is powerless to interfere in the dispute. *N.L.R.B. v. Retail Store Employees Union, Local 1007 (Safeco),* 447 U.S. 607 (1980).

istence of that dispute by handbills urging a consumer boycott not only of the bank but of each of the bank's depositor's businesses as well. The Board's logic, extended to its natural conclusion, would suggest that the primary employer-borrower produces the products or services of the other bank customers because the capital contributed by the primary employer in the form of loan repayments enhances the value of the bank's business, which by payment of interest in turn enhances security of the other depositors' funds.

It cannot be argued that Congress intended to permit a consumer boycott of a bank's customers or investors under such circumstances, even when promoted only by publicity. Yet the relationship between the subsidiary and the conglomerate's other divisions in *Pet* was no different, apart from their corporate affiliation, than the relationship between a bank borrower and the bank's other customers or stockholders.

So, in *DeBartolo,* the Board found in the standard lease terms an economic interrelationship between all the tenants in the mall, the mall owner, the department store under construction, and the construction company. Specifically, the Board found the relationship "symbiotic." The Board's decision provides no standard by which one can determine whether there is the requisite "symbiotic" relationship. However, given the expansionist tendency in this case and *Pet,* its reasoning may well lead to application of the provision in situations even farther from the language and purpose of the statute than that in *DeBartolo.* In *DeBartolo,* the Board focused on the interdependency among mall tenants as exemplified by the addition of the department store under construction:

> A functioning Wilson's store will attract consumers to the mall who will then visit and purchase products from other tenants, and, reciprocally, Wilson's will profit

> from its proximity to the other tenants. Thus, each tenant gains the advantage of a market attracted by all the other tenants. Further, DeBartolo is not wholly unconcerned with this relationship, for its leases provide that, in addition to receiving monthly rents, it will share in the commercial success through percentage rents it collects from the tenants. (A. 28)

Thus, the Board's reasoning could logically be extended to any number of common situs situations (office parks, industrial parks, etc.) where the only link is the lease and certain common property interest. Under the Board's view, even membership in a downtown merchants association featuring in various projects of mutual benefit including joint advertising of special events, area beautification, etc., could expose one member to a boycott because of the labor dispute of another member. The Board's reasoning in *DeBartolo* suggests that because all members of the association would share in the commercial success of the downtown area all would be distributors of the products produced by an individual store and a boycott of the entire downtown "enterprise" would be proper under the proviso.

It cannot be imagined that Congress, when it closed the loopholes against secondary boycotts and then reopened one only slightly in the form of a publicity proviso, intended that unions be permitted to handbill neutral employers with no direct meaningful business relationship[25] to the primary employer and boycott all their products.[26]

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25. Indeed, in both *DeBartolo* and in the example above, the retailers which are truly strangers to the labor dispute are in many cases competitors of the department store the construction of which engendered the dispute.

26. The important lynchpin of enhancing the "product" by adding labor, which "labor" was subject of the primary dispute, is obviously lost when the Board leaves this well-chartered area by ignoring the words used by Congress. This then permits a broad based boycott of all products which are manufactured and distributed by suppliers of the other retailers who do not even have a "symbiotic" relationship with the shopping center.

Congress clearly meant the producer-distributor language of the proviso as a limitation upon the range of secondary employers who might be subject to coercive consumer boycotts promoted by handbills or other publicity. The Board must not be permited to destroy that limitation by flouting the plain meaning of the proviso by distorting the generally accepted meaning of the terms "products," "producer," and "distributed."

CONCLUSION

Because the decisions of the National Labor Relations Board and the Court of Appeals for the Fourth Circuit have misinterpreted the meaning of the proviso to Section 8(b)(4) of the National Labor Relations Act and because their decisions permit coercive activity to be directed at neutral employers with no meaningful business relationship to an employer who has a labor dispute with the union, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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v.

NATIONAL LABOR RELATIONS BOARD

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF THE PETITIONER

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American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) 18

Cedar Crest Hats, Inc. v. Hatters Union, 362 F.2d 322 (5th Cir. 1966) 13

Florida Gulf Coast Building Trades Council (Edward J. DeBartolo Corp.) 252 NLRB 702 (1980), *affirmed sub nom. DeBartolo v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *cert. granted*, —— U.S. —— (1982) ..... *passim*

Hoffman v. Cement Masons Union Local 337, 468 F.2d 1187 (9th Cir. 1972), *cert. denied* 411 U.S. 986 (1973) 21

Houston Building and Construction Trades Council (Claude Everette Construction Co.), 136 NLRB 321 (1962) 19

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Comment, *Publicity Under Section 8(b)(4) of the Labor Management Reporting and Disclosure Act*, 80 Dick L. Rev. 768 (1976)	20
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H. Rep. No. 245, 80th Cong., 1st Sess. (1947) *reprinted in* I NLRB, Legislative History of the Labor Management Relations Act, 1947, at 314 (1948)	6-7

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Labor Management Services Administration, U.S. Dep't. of Labor, *Annual Construction Industry Report, April 1981* (1981) 3

Note, *Picketing and Publicity Under Section 8(b)(4) of the Labor Management Relations Act*, 73 Yale L.J. 1265 (1964) 22

S. Doc. No. 10, 86th Cong., 1st Sess. (1959) (Proposed Labor Management Legislation), *reprinted in* I NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 82 (1959) 7

S. Rep. No. 187, 86 Cong., 1st Sess. (1959), *reprinted in* II NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 474 (1959) 8

State of the Union Address by President Truman (January 6, 1947), *reprinted in* I NLRB, Legislative History of the Labor Management Relations Act, 1947, at 482 (1948) 6

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Statement of Sen. Kennedy (April 24, 1959), *reprinted in* II NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 1195 (1959) 8

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Summary Analysis of Conference Agreement on S.1555 (September 3, 1959), *reprinted in* II NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 1712 (1959) 8

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Respondents

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---

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITIONER

The Associated General Contractors of America, Inc. ("AGC") hereby respectfully submits this brief in support of the Petitioner in No. 81-1985 on a writ of certiorari issued by this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 20, 1981.*

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* Amicus accepts Petitioner's Statement of the Case. Pursuant to Sup. Ct. R. 36.1, written consent of the parties to the filing of this brief is submitted herewith.

INTEREST OF THE AMICUS

The Associated General Contractors of America, Inc. is a national trade association consisting of 113 state and local chapters and representing 30,000 firms, including approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms employ approximately 3.5 million workers and generate annual revenues of about $150 billion. AGC members perform nearly 80 percent of the general contracting construction business undertaken in the United States, including the construction of highways, industrial, municipal and utility facilities, and commercial buildings, including shopping malls. Construction represents approximately 8 percent of the annual Gross National Product of the United States.

AGC represents its general contractor members in important matters vitally affecting their interests before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the Federal Government. This includes assistance to courts in their deliberations on significant decisions concerning labor-management relations in the construction industry, such as the issue now before this Court.

Although the handbilling in the present case was aimed at securing a total boycott by potential customers of retail stores, the primary labor dispute giving rise to the handbilling originated with a general contractor on a construction project in the shopping mall. There is immense potential for harm to neutral employers and to the general public if construction industry labor disputes are extended without limitation.

Construction industry labor relations remain highly fragmented, most often with multiple employers (general, subcontractor and specialty contractors) on a project site. Fifteen building trades unions were signatory to some

6,000 separate collective bargaining agreements which covered about 40 percent of all construction workers in 1980.

A 1977 Census Survey of the industry showed 474,943 firms with payrolls in construction.[1] In addition, during the years 1973 to 1981 there was an increase of 400,000 in the number of non-union construction workers to three million and a decline of 125,000 in the number of workers represented by unions to 1.6 million.[2] These factors alone might be expected to nourish the environment for labor unrest in general and secondary boycott activity in particular, especially when viewed together with the industry's traditional high turnover and mobility of workers, and the fact that it has experienced proportionately greater strike activity than many other industries.[3] And, although in 1980 new construction expenditures exceeded $228 billion and construction employment was estimated at 4.5 million, construction unemployment was about two times the national average or 13.8 percent by the close of 1980. Conditions the industry faces today are even more difficult and are more likely to precipitate secondary and other labor disputes.

The issue of the coercive handbilling of neutral employers is of critical importance to general contractors who work with or without collective bargaining agreements. While the case at hand deals with a non-union general contractor, the same dispute could also occur where a general contractor operating under collective bargaining agreements is faced with a labor conflict (e.g., a jurisdictional or contract renegotiation dispute) with the labor organization which represents his employees.

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[1] Labor Management Services Administration, U.S. Dep't. of Labor, Annual Construction Industry Report, April 1981 3 (1981).

[2] Construction Labor Research Council, Union Non-Union Employment Trends in Construction 1 (1981).

[3] Bureau of Labor Statistics, U.S. Dep't of Labor, Work Stoppages in 1980, Table 4 (1981) (U.S. DOL #81-74).

AGC represents both union and non-union general contractors, and is uniquely situated to present the concerns of all general contracting firms.

Further, AGC and its members are vitally concerned that the limitations on coercive handbilling intended by Congress in Section 8(b)(4)(ii)(B) be sustained by this Court. Under National Labor Relations Board ("NLRB" or "Board") policy and the decision below, general contractors will face the possibility of secondary pressures from neutral employers not a party to the labor dispute and having no business or commercial relations with a primary employer, such as the pressure generated by consumer boycotts. Moreover, these neutral employers will have no way to extricate themselves from the dispute.

The Board policy and the decision below, as we will demonstrate *infra*, do not reflect the intention of Congress, and are unfair to both primary and neutral employers. In any event, labor organizations have extensive other remedies available to them under the National Labor Relations Act ("NLRA" or "Act"). 29 U.S.C. §§ 151-168 (1976).

SUMMARY OF ARGUMENT

The tribunals below erroneously interpreted the publicity proviso to Section 8(b)(4) of the NLRA to permit coercion of secondary employers who did not use, work on, or distribute the primary employer's product or service. When Congress amended the Act in 1959, the overriding purpose was to strengthen the prohibitions against secondary pressures. In accordance with that intent, the proviso's language, its legislative history and application show that an actual producer-distributor relationship is required, not some type of economic "symbiosis" as relied upon below. Neither DeBartolo nor the tenants of East Lake Square Mall had a producer-distributor relationship with the primary employer, and thus were true neutrals entitled to the full protection of Section 8(b)(4). Pro-

tecting these employers, who were not involved in the primary's dispute, and who were powerless to resolve it, leaves the unions with extensive ways to influence the primary employer and any secondary employers who fall within the proviso.

Because the United States Court of Appeals for the Fourth Circuit agreed with the NLRB that total boycott handbilling of neutral employers without the requisite relationship to the primary employer was permitted by the publicity proviso to Section 8(b)(4), Amicus respectfully submits that this Court should reverse the decision below.

ARGUMENT

A. The Publicity Proviso of Section 8(b)(4), Even Interpreted Broadly, Does Not Extend Beyond the Producer-Distributor Relationship

The NLRB and the Fourth Circuit below have erroneously extended the publicity proviso[4] to sanction hand-

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[4] 29 U.S.C. § 158(b)(4) (1976). Section 8(b)(4) provides, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—(4)(i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * *
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . .
>
> * * *
>
> *Provided* . . ., That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing

billing of neutral employers (mall stores) who do not deal with the product (building) of the primary employer (High). Although there is a symbiotic relationship among the tenants of the mall and DeBartolo, this relationship is not, in any event, with the primary but with the primary's customer (Wilson's). This extension is far beyond the kind of coercive conduct Congress sanctioned by the proviso. The proviso permits publicity other than picketing directed against those secondary employers who are dealing with or distributing the primary employer's products: in short, those who are in the primary employer's chain of production and distribution.

1. Congressional Intent Was to Limit Secondary Pressures

As enacted, the National Labor Relations Act of 1935 [5] contained no union unfair labor practices. By January 1947, President Truman in his State of the Union Address recognized the desirability of controlling secondary activity by legislation to "prohibit secondary boycotts in pursuance of unjustifiable objectives, but [which] does not impair the union's right to preserve its own existence and the gains made in genuine collective bargaining." [6] One concern of Congress was that in a boycott situation,

> [m]ore often than not the employers are powerless to comply with demands giving rise to these activities,

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any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. . . .

[5] National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-168) (1976)).

[6] State of the Union Address by President Truman (January 6, 1947), *reprinted in* I NLRB, Legislative History of the Labor Management Relations Act, 1947, at 482 (1948) [hereinafter cited as I LHLMRA].

> and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all. [H. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), *reprinted in* I LHLMRA, *supra* note 6, at 314.]

Among the results of secondary boycotts cited were the loss of jobs by innocent people and the waste of boycotted perishable products.[7] Many of Congress' 1947 amendments to the NLRA,[8] particularly the addition of Section 8(b)(4) as well as Sections 10(l) and 10(k), were clearly aimed at labor problems in the construction industry, since the industry's diversity of employers and workforce instability made it particularly susceptible to secondary and jurisdictional disputes.[9]

When Congress included a secondary boycott prohibition in the Labor Management Relations Act of 1947 and enacted the amendments over President Truman's veto, it was not aware that some loopholes in that language still permitted secondary boycotts which, twelve years later, would cause another president to call for additional restrictions on such activities.[10] Congress approached the problem of secondary pressure with such a vengeance that some were concerned that unions would have been denied certain fundamental rights to publicize

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[7] Statement of Rep. Landis (March 24, 1947), *reprinted in* I LHLMRA, *supra* note 6, at 583; statement of Sen. Ellender (April 28, 1947), *reprinted in* II NLRB, Legislative History of Labor Management Relations Act, 1947, at 1056 (1948).

[8] Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-144, 171-188) (1976).

[9] Bornstein, *In Search of a Coherent Labor Policy for the Construction Industry*, 32 Lab.L.J. 588, 591 (1981).

[10] S. Doc. No. 10, 86th Cong., 1st Sess. (1959) (Proposed Labor Management Legislation), *reprinted in* I NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 82 (1959) [hereinafter cited as I LHLMRDA].

their labor disputes under the language of some of the pending legislative proposals.[11]

Many in the Senate wanted to permit all forms of coercive activity against secondary employers, while the House position favored prohibiting all such activity. Senator John F. Kennedy, Conference Committee chairman, observed that where a secondary employer does business with a primary employer and assists him in an economic struggle with the union, it is not a true neutral in the dispute.[12] In any event, all were concerned about secondary pressures on true neutrals.

A major congressional objective in 1959 was "banning secondary boycotts to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer." [13] A review of the legislative history of the publicity proviso shows that Congress intended to permit secondary pressure under the following circumstances: where a secondary employer sells a product made under racket or sweatshop conditions, where a strike is in progress,[14] where retail stores sell a product manufactured by an employer with whom the union has a dispute,[15] or where

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[11] Statement of Senator Humphrey (April 17, 1959), *reprinted in* II NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 10037 (1959) [hereinafter cited as II LHLMRDA].

[12] Statement of Senator Kennedy (April 24, 1959), *reprinted in* II LHLMRDA, *supra* note 11, at 1195.

[13] S. Rep. No. 187, 86th Cong., 1st Sess. 78 (1959), *reprinted in* II LHLMRDA, *supra* note 11, at 474.

[14] Statement of Sen. Kennedy (September 3, 1959), *reprinted in* II LHLMRDA, *supra* note 11, at 1432.

[15] Summary Analysis of Conference Agreement on S.1555 (September 3, 1959), *reprinted in* II LHLMRDA, *supra* note 11, at 1712.

certain goods sold by a store are non-union.[16] If Congress had wanted to allow secondary activity based on a "symbiotic"[17] relationship or indirect economic interdependence, it surely would not have used the limiting words "produced" and "distributed" in the proviso, and would not have so narrowly focused on specific products of primary employers in the debate.

In this case, the various business leaseholds or financial obligations and relationships, however important, were not "products," and aggregating these relationships which are irrelevant for the purposes of the proviso does not make them relevant.

Additional support for this view may be found by looking to the Fair Labor Standards Act (FLSA)[18] to which this Court referred in *NLRB v. Servette*, 377 U.S. 46 (1964), the Court's first ruling on the publicity proviso. This Court found support in FLSA Section 203(j) for a broad reading of the proviso's use of the word "producer" to include not just those who physically create goods, but also those who distribute such goods.[19] Interestingly, although the FLSA definition of "goods" includes "products" or "any part thereof," it "does not

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[16] Statement of Rep. Thompson (September 4, 1959), *reprinted in* II LHLMRDA, *supra* note 11, at 1720.

[17] *Florida Gulf Coast Bldg. Tr. Council (Edward J. DeBartolo Corp.)*, 252 NLRB 702 (1980), *affirmed sub nom. DeBartolo v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *cert. granted*, —— U.S. —— (1982) [hereinafter cited as *Florida Gulf Coast*].

[18] 29 U.S.C. §§ 201-219 (1976).

[19] 29 U.S.C. § 203(j) (1976).

The broad reading of the term "product" found warranted in *Servette* did not require that the proviso cover virtually all relationships between a primary employer and others, no matter how indirect. As too narrow a reading of the term "product" could render it "virtually superfluous" (377 U.S. at 56) so could too broad a reading carry it beyond the intent of the statute and U.S. labor policy.

include goods after their delivery into the actual physical possession of the ultimate consumer thereof. . . ." [20] Although the business of construction or reconstruction has been included within the FLSA by a specific section since 1967 [21] and the coverage of a construction firm no longer depends on the dollar volume of its business or the relationship of its products to interstate commerce,[22] it still would appear that a building is a product within the FLSA definition of "goods." In the instant case, the product (building) produced by the primary employer (High) was being constructed for the ultimate consumer (Wilson's). Since the FLSA defines the term product to exclude anything in the hands of a consumer, further distribution would not be undertaken within the meaning of the statute. For a building not constructed for resale, the chain of production, distribution and consumption is a short one; it runs from the contractor to the owner. The building is not in any sense further distributed within the meaning of the FLSA or the publicity proviso of NLRA Section 8(b)(4). The owner of the building may use it to house various functions, but those functions are unrelated in type, form and objective to those of the contractor which built the structure. The owner's operations in the building are in fact the beginning of a new production chain with that owner as the "producer" or "distributor" of a different product within the meaning of Section 8(b)(4) and the FLSA.

Even the strained interpretation of the term "producer" by the NLRB below cannot change the statutory test of the proviso from a producer-distributor relationship to that of merely a "mutually dependent and beneficial relationship" containing "mutual obligations" and

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[20] 29 U.S.C. § 203(i) (1976).

[21] Act of February 1, 1967, P.L. 89-601, 80 Stat. 830-832, 837 (1966) (codified at 29 U.S.C. § 203(s)) (1976).

[22] *See, e.g. Mitchell v. H. B. Zachry*, 362 U.S. 310 (1969).

result ultimately in the total elimination of distinctions between classes of secondary employers. From a macro-economic perspective, all employers in the United States are symbiotically linked. Obviously, such relationships alone do not mean that a producer-distributor situation exists between these employers. This unreasonable and expansive interpretation of the narrow language of the proviso is far beyond anything Congress intended, particularly since the purpose of the 1959 amendments to Section 8(b)(4) was *to strengthen* the federal prohibition against secondary boycotts.

2. The Proviso Has Been Consistently Applied to Permit Coercion Of Only Those Secondary Employers Which Have Purchased The Primary's Product(s)

Mindful of the specific language exempting coercive publicity from Section 8(b)(4) when "a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer," the courts and the NLRB have routinely applied the proviso only where a specific product or service has run from the primary to the secondary employer. Most of these cases show that the secondary had at least the opportunity to stop purchasing goods or services from the primary.[24] While it is true that some

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[24] *Operating Engineers, Local 139 (Oak Construction Co.)*, 226 NLRB 759 (1976) (secondary could terminate contract for manholes and underground telephone conduits); *Los Angeles Typographic Union No. 174 (White Front Stores)*, 181 NLRB 384 (1970) (secondary could stop purchasing advertising from primary); *United Plant Guard Workers Union (Houston Armored Car Co.)*, 136 NLRB 110 (1962) (secondary could stop purchasing protective services from primary); *A.F.T.R.A. Local 55 (Great Western Broadcasting Corp.)*, 134 NLRB 1617 (1961), *reversed*, 310 F.2d 591 (9th Cir. 1962), *supplemented*, 150 NLRB 467 (1964), *affirmed*, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966) (secondary could stop purchasing advertising from primary); *Teamsters, Local 901 (Editorial "El Imparcial," Inc.)*, 134 NLRB 885 (1961) (secondary could stop purchasing advertising from pri-

substantial benefits and resulting in a "symbiotic" [23] relationship arising out of the mall enterprise in its entirety.

As discussed, Congress intended the publicity proviso to authorize only a limited range of secondary pressure, to permit unions to threaten, coerce and restrain secondary employers if, first, the unions do not engage in picketing, second, the publicity is truthful, and third, the secondary employers distribute the products of the primary. Congress, in effect, drew concentric circles, circles which reflect the judgment that a union's right to coerce an employer is greatest vis-a-vis the primary employer, and that society has a serious interest in protecting neutrals from most disputes not of their making. The first circle encompasses the primary employer, and within that circle, the union can maximize its coercive power, through strikes, picketing, handbilling, and other forms of activity. The second circle encompasses the secondary employer who distributes the products of the primary, and anywhere within that second circle, coercive publicity, threats, and other restraint, short of picketing, are still lawful.

Outside the second circle are all employers which are not only secondary, but which do not distribute the product(s) of the primary. These other employers are protected from all coercive publicity by Section 8(b)(4). Within this group are DeBartolo and the mall tenants.

Of course, wherever conducted, union publicity which does not threaten, coerce or restrain is permitted, since such publicity does not fall within Section 8(b)(4). In Section 8(b)(4), Congress balanced powers and limitations to ensure that parties and non-parties to labor disputes can exercise their rights, including their constitutional rights, while protecting the rights of those outside the producer-distributor relationship.

Built upon references to symbiotic and other vague economic relationships, the policy endorsed below would

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[23] *Florida Gulf Coast, supra* note 17, at 705.

of the decisions are difficult to square with the plain language of the proviso, the results, with one true exception discussed *infra*, seem within the statutory intent.

For example, the Board reasoned that a radio station advertising automobiles became a "producer" of autos. *Radio and Television Engineers Local 662 (Middle South Broadcasting Co.)*, *supra*, note 24. Obviously, the station's product was radio advertising, not automobiles. Nevertheless, because the secondary dealership made use of that product in its business, a finding that the proviso applied was in accord with the statutory intent. In any event, the cases have found that a place in the chain of production and distribution of a product is key to application of the proviso.

Three Board decisions seems to suggest that a construction subcontractor's chain of production-distribution runs through the general contractor to the owner, even though the owner may or may not have an opportunity to cease doing business with the subcontractor.[25] As-

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mary); *Radio and Television Engineers, Local 662 (Middle South Broadcasting Co.)*, 133 NLRB 1698 (1961) (secondary could stop purchasing advertising from primary); *Teamsters, Local 968 (Schepps Grocery Co.)*, 133 NLRB 1420 (1961) (secondary could stop purchasing groceries from primary); *Plumbers and Pipefitters, Local 142 (Shop-rite Foods)*, 133 NLRB 307 (1961) (secondary could cancel contract for installation of refrigeration equipment); *IBEW, Local 202 (Packard Bell Electronics Corp.)*, 132 NLRB 1049 (1961) (secondary could stop purchasing installation and repair services from primary). *Cf., Cedar Crest Hats, Inc. v. Hatters Union*, 362 F.2d 322 (5th Cir. 1966) (secondary could stop purchasing hats from primary).

At least one decision suggests that the proviso will not be applied if the secondary does not purchase the primary's products. *See Service and Maintenance Employees, Local 399 (Burns Detective Agency)*, 136 NLRB 431 (1962) (sports arena could not sever lessee's contract for protective services).

[25] *See Williamsport Building and Construction Trades Council (Sardec, Inc.)*, 192 NLRB 6 (1971); *IBEW, Local 712 (Golden Dawn Foods)*, 134 NLRB 812 (1962); *IBEW, Local 73 (Northwestern Construction of Washington, Inc.)*, 134 NLRB 498 (1961).

suming *arguendo* that the NLRB intended to make such a suggestion, and further assuming that such a suggestion is a correct interpretation of the Act, these three cases are still consistent with the conclusion that the second concentric circle encompassed High and Wilson's, but not DeBartolo, or the other tenants of the mall. These cases, even when broadly read, fail to suggest that any construction contractor's chain of production and distribution runs beyond an owner to anyone else, or that the union could lawfully coerce anyone other than High or Wilson's in the present case.

The one true exception to the Board's otherwise consistent line of proviso decisions is *United Steelworkers of America (Pet, Inc.)*, 244 NLRB 46 (1979), *reversed, sub nom. Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981), where the union had coerced the corporate parent of the primary employer (a manufacturer of refrigeration equipment) and several other subsidiaries of the same parent. The parent and other subsidiaries had interacted with the primary through the corporate structure which the parent had created, but they had not handled, produced or distributed the primary's products. The Board, however, looked to the corporate relationship, the earning of profits, the common corporate image and other factors to find that the proviso applied. In so doing, the Board implied that a union can lawfully coerce a secondary employer who is completely outside the primary's chain of production and distribution.

In *Pet*, the Board relied upon *Teamsters Local 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961), in which it had endorsed the proposition that the word "produced" in the proviso is not to be read literally as reaching only manufacturers, but includes wholesalers. Later this Court in *NLRB v. Servette, supra*, endorsed the same proposition. However, neither *Lohman* nor *Servette* carried the broad implications of *Pet.*

The NLRB decided *Pet* wrongly because it would not go beyond the *Lohman* test of "labor in the form of capi-

tal, enterprise, and service." As already implied, the Board designed this test, at the outset, to serve another purpose.[26] The formula would ensure that the secondary had some kind of economic relationship with the primary, but would not reach the dispositive question: whether the secondary distributes the product of the primary. As discussed, the fact patterns of past Board cases in which the proviso was held to apply fortuitously involved primary and secondary employers who were *de facto* in a producer-distributor relationship, despite the Board's emphasis on their economic interrelationship. All producer-distributor relationships are economic relationships, but not all economic relationships are producer-distributor relationships.

In *Pet*, the Board misdirected the *Lohman* test by shifting its focus from whether there was a distribution of a product to whether there was some economic interrelationship between the employers. The Board thereby failed to heed the proviso's specific language and its legislative intent which require not only that there be a producer, but also that the secondary distribute the specific product or service of the primary.

The Eighth Circuit reversed in *Pet* because it saw that *Lohman* and its progeny, including *Servette*, were limited

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[26] *Teamsters Local 537 (Lohman Sales Co.), supra*, is an early case in which a union had handbilled several retail outlets for carrying products handled by a wholesaler with whom the union had a primary dispute. In every literal sense, the retail outlets had entered the wholesaler's chain of production and distribution. The NLRB concluded that any primary employer which has rendered a service has, in doing so, "produced" a "product." The primary employer does not have to be "the actual manufacturer" so long as it contributes "labor in the form of capital, enterprise, and service to the product" which the secondary then distributes. *Id.*, at 907.

In short, the NLRB designed the *Lohman* test to equate "services" with other "products." Primary employers would not have to face the pressure which secondary picketing could generate, but whatever the nature of their enterprise, they would have to face some secondary pressure.

in scope: "[A]ll found that the primary was a "producer" when the primary was directly involved in the promotion and/or distribution of the products of the secondary." 641 F.2d at 549. In other words, the secondary employers had, in fact, entered the primary's chain of production and distribution. The Eighth Circuit correctly added: "[T]he Board's decision [does not flow] from *Servette*, *supra*, because the Supreme Court was not there considering a case in which the [primary's] products and services were unrelated to the [secondary's] products." *Id.*

In the case at bar, the NLRB relied primarily on the opinion which the Eighth Circuit later reversed. The Board then compounded its error by construing that opinion so broadly as to repudiate the legislative history. The Board would apply the proviso so long as it could find some kind of "mutually dependent and beneficial relationship"[27] between the secondary and the primary. Whether the secondary had entered the primary's chain of production and distribution would be completely irrelevant under this interpretation. The NLRB summarized:

> [T]he mutual obligations between the parties and the benefits derived from participation in the mall enterprise reflect the symbiotic nature of the relationship between DeBartolo and its tenants, not unlike the relationship between the operations of a diversified corporation. High's contribution to this enterprise is as an employer which applies its labor to a product, i.e., the Wilson's store from which DeBartolo and its tenants will derive substantial benefit. [252 NLRB at 705.]

As overbroad as it was, even the Board's opinion in *Pet* never purported to encompass the almost limitless number of relationships of a "symbiotic nature."

As did *Pet*, the case at bar requires more than the mere incantation of the *Lohman* test. All of the East

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[27] *Florida Gulf Coast*, *supra* note 23.

Lake Mall employers were producers or distributors in some sense, *but not of any product of the primary employer*, High. Only Wilson's was a customer of High, and only Wilson's had a relationship with High which could be severed.

The NLRB and the court below misconstrued the teachings of *Lohman* and *Servette* and avoided the more sophisticated analysis demanded by the facts. Those decisions merely equate "services" with other "products" for purposes of the publicity proviso, thereby assuring that all primary employers can be subjected to some secondary pressure. However, the court below wrongly construed these cases to address the very different question of whether DeBartolo or his tenants had entered into High's chain of production and distribution.

While the court below stated that "a narrow or literal construction" of the proviso "would often defeat its clear purpose of protecting labor's ability to publicize . . . its grievances to consumers . . .," 662 F.2d at 270, Petitioner's position below was simply that the court should not read the proviso so broadly as to erase the proviso's requirements for production and distribution.

The Fourth Circuit also erred in reading several construction industry cases to lend special support to its generous interpretation of the proviso. Two of these cases are entirely consistent with the legislative history. *See Operating Engineers, Local 139 (Oak Construction Co.)*, *supra*, note 24; *Plumbers and Pipefitters, Local 142 (Shop-Rite Foods)*, *supra*, note 24. The other three[28] could not, in any event, support the Fourth Circuit's conclusion: that the proviso authorized the union to coerce not only Wilson's, but also DeBartolo and the other tenants of the mall.[29]

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[28] *See* note 25, *supra*.

[29] The Fourth Circuit also improperly relied upon *Sheet Metal Workers, Local 54 (Sakowitz, Inc.)*, 174 NLRB 362 (1969). *Sakowitz* is not a construction industry case. The primary employer

As in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the matter presented here is a mixed question of law and fact. This Court should therefore defer to the Board only if the latter's conclusions were "based on articulated facts and consistent with the Act." *Id.*, at 690.

The NLRB introduced a great number of facts in the case at bar, but none of these would justify its ultimate conclusion that High had a producer-distributor relationship with DeBartolo and the tenants of the mall. Indeed, the facts served primarily to obscure the absence of such a relationship. As this Court said in *Yeshiva*, with reference to previous NLRB decisions on academic faculties, the Board announced a rationale and "then quickly transformed [it] into a litany to be repeated in case after case. . . ." *Id.*, at 685.

In any event, the Board's decision was not consistent with the statute. As in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), the Board's decision was "fundamentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Id.*, at 318.

The cases discussed demonstrate that protections of the proviso are available only where a producer-distributor relationship exists between the primary and secondary employer. Therefore, DeBartolo and the mall tenants were subjected to coercive secondary pressures outside the protection of the publicity proviso.

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was a heating and air conditioning contractor, but the case revolved around its part ownership of heating and air conditioning facilities. Moreover, the case did not address the question relevant here. The NLRB general counsel in *Sakowitz* argued that some kind of geographical limitation inheres in the proviso. The NLRB disagreed without ever reaching the possibility that the secondary had not entered the primary's chain of distribution.

B. Construction Unions Have Adequate Methods for Pressing Their Labor Dispute Without Coercing Neutral Employers Who are Uninvolved in the Dispute and Who Can Do Nothing to Settle It

From the determination with which the building trades unions in this case have pursued—and gained from the NLRB and the court below—the right to handbill for a total boycott of neutral employers, one might expect that the unions had no other way to publicize their labor dispute with High regarding its construction of Wilson's Department Store at the mall. On the contrary, under the NLRA and the NLRB's interpretations of it, the unions had available a panoply of lawful methods for addressing their concerns, both as to the primary employer, High, and the possible secondary employer, Wilson's.[30]

As to the primary employer, the unions were free to picket the site of High's construction project for up to 30 days for recognition as bargaining agent under Section 8(b)(7)(C). 29 U.S.C. § 158(b)(7)(C) (1976). They could picket indefinitely at the site advising the public that High paid wages and benefits below area standards, if that in fact was the case.[31] The building trades could have picketed other job sites of High as to area standards.[32] Handbills could have been distributed at the location(s) of the primary employer as part of,

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[30] As the NLRA has been applied to the construction industry, each employer on a site is a separate employer responsible for its individual labor relations matters. *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). As a result, there are special rules for union picketing which seeks to involve employers on site other than the primary employer. See *Sailor's Union of the Pacific* (*Moore Dry Dock*), 92 NLRB 547 (1950). These rules, however, allow full union pressures against the primary and its allies.

[31] *Houston Building and Construction Trades Council* (*Claude Everette Construction Co.*), 136 NLRB 321 (1962).

[32] *See e.g. Ventura County District Council of Carpenters* (*Compositor Construction*), 242 NLRB 1109 (1979).

or instead of, the picketing.[33] Other media access was also available: newspapers, radio and television advertisements could have been utilized.

Assuming *arguendo* that Wilson's was a secondary employer subject to the proviso in this case, the Florida Gulf Coast Building Trades Council also had ways of lawfully publicizing its disagreement with Wilson's. Among the possible vehicles available were handbills to Wilson's customers at the East Lake Mall site or other Wilson's locations, putting Wilson's on an unfair list (*IBEW Local 73 (Northwestern Construction of Washington, Inc.)*, *supra*, note 25), using sound trucks and newspaper, radio and television advertising.[34] In fact, most of these approaches might well have been more effective than urging a boycott of uninvolved mall stores who could not influence the resolution of the dispute.

Although the unions in this case had a large selection of viable methods to use on High and Wilson's, DeBartolo and the mall stores, contrary to the decision below, had virtually no way to extricate themselves from the dispute by refusing to deal in the product of the primary or by severing relations with the primary since there were no such relationships to terminate. In short, the handbill targets had no viable way to avoid the extension of the labor dispute to them.

The wide range of weaponry authorized by the NLRA and interpretations thereunder underscore the care with which Congress sought to balance the rights of parties to labor disputes with the rights of neutral employers. The limitations on secondary pressures inherent in § 8(b)

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[33] *Lumber & Sawmill Workers Local 2797 (Stoltz Land & Lumber Co.)*, 156 NLRB 388 (1965).

[34] For a discussion of the array of techniques available to unions under the proviso, see Comment, *Publicity Under Section 8(b)(4) of the Labor Management Reporting and Disclosure Act*, 80 Dick. L. Rev. 768, 782 (1976).

(4) are thus compatible with constitutional, economic, and industrial concerns and there is no need to expand endlessly the parameters of secondary pressure.[35]

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[35] Even if one assumes *arguendo* that DeBartolo and the mall stores were secondary employers within the scope of the publicity proviso, it is not clear that a total boycott of a secondary should be lawful, since the boycott reaches beyond the primary's product and encompasses all distributions by the secondary employers. In such a situation, the secondary activity should not be permitted because the primary's product (the mall enterprise as the NLRB and the Fourth Circuit apparently viewed it) cannot be separated from the products offered by the secondary employers (various retail goods sales). In *K&K Construction Co. v. NLRB*, 592 F.2d 1228 (3rd Cir. 1979), a carpenter's local undertook an area standards picket of a housing developer's sales office because of a labor dispute with a n ɔ-union carpentry subcontractor who worked on the houses. The *K&K* court found that the primary's product (carpentry) was merged into the secondary's product (houses), and thus the picketing encouraged prospective house buyers to boycott the secondary's entire business. Although in dicta the K&K court noted that handbilling to the same effect would have been permitted under the proviso, the picket signs and handbills in that case did not urge a total boycott. See also *Hoffman v. Cement Masons Union Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. den.*, 411 U.S. 986 (1973).

Looking at it another way, if secondary action aimed at virtually the sole product of the secondaries (retail sales) threatened ruin and substantial loss, it should be restricted under the doctrine which this Court announced in *NLRB v. Retail Store Employees Union Local 1001 (Safeco)*, 447 U.S. 607 (1980). Although *Safeco* was a picketing and handbilling case, the potential for harm in total boycott handbilling cases is similar. After all, the publicity proviso to Section 8(b)(4) waives the secondary prohibitions only for information which is not only truthful, but which relates to specific products of the primary employer which are distributed by the secondary employer. While product specific handbill boycotts of secondary employers may be permissible under the proviso, blanket boycotts are contrary to both the proviso and the public policy of the NLRA. If the union's disagreement with a secondary employer who distributes products of the primary is that distribution alone, why should the secondary's entire product line

C. Appropriate Limitations on Secondary Coercive Activity Comport with Constitutional Guarantees

Had the building trades handbill in the present case been noncoercive or limited in focus on the primary employer, no violation of Section 8(b)(4) would have been made out. As noted, there were a number of other ways for the unions to publicize their labor dispute. Finding the coercive handbilling of DeBartolo and the other neutral mall employers unprotected would be in "conformity with dual congressional objectives of preserving the right of labor organizations to bring pressure to bear upon offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[36] The fact that handbilling may be in violation of Section 8(b)(4)(ii)(B) because it is either untruthful or is not applied to an employer distributing products of the primary employer, (or urges a total boycott instead of having a product specific focus), does not result in an unreasonable infringement on the rights of the union to express its opinion. The right to free speech is not absolute[37] and Congress has the power to enact reason-

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(primary and non-primary employer products) be subject to the union's boycott thrust? In Note, *Picketing and Publicity Under Section 8(b)(4) of the Labor Management Relations Act*, 73 Yale L. J. 1265, 1282 (1964), the author suggests that handbilling which is not product specific and which threatens, coerces or restrains a secondary employer should be found in violation of the proviso. A total boycott policy provides the union with a remedy unequal to the extent of the secondary's relationship to the primary and the dispute. A proper reading of the proviso would enable the union to publicize its objection to certain products because of a labor dispute with a manufacturer or distributor without doing disproportionate damage to the secondary by urging a boycott of all of the secondary's products.

[36] *NLRB v. Denver Building and Construction Trades Council*, *supra* note 30, at 692.

[37] *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).

able restrictions such as Section 8(b)(4) to protect neutrals from disputes not of their own making.[38] In fact, as noted earlier, the proviso was specifically designed to overcome concerns that modifications to Section 8(b)(4) were too expansive and risked possible constitutional faults.[39] The publicity proviso in no way prevents the unions from airing their view of the labor dispute, expressing as it does an important societal concern that innocent parties not be subjected to labor disputes they did not cause and can not resolve or influence. Since, in the instant case the objects of the handbilling were neither primary employers nor distributors of the primary's product, denying the protection of the publicity proviso to the handbilling here is eminently reasonable. The contrary result permitted by the decisions below would allow unreasonable interference with the right of innocent employers to be left alone, and would extend construction industry labor disputes to non-involved parties in other industries.

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[38] *Service Employees Local 399 (Delta Airlines)*, 263 NLRB No. 153 (1982).

[39] The First Amendment does not require a strained interpretation of the proviso because Section 8(b)(4)(ii)(B) does not, in any event, contravene the Amendment. In *IBEW, Local 501 v. NLRB*, 341 U.S. 694 (1951), this Court explained that the predecessor to § 8(b)(4)(ii)(B) was "broad enough" to prohibit "every form of influence or persuasion." *Id.*, at 701-702. Yet, the provision "carrie[d] no unconstitutional abridgement of free speech." *Id.*, at 705. The implication is inescapable. Section 8(b)(4)(ii)(B) could hardly be any broader. Finding that the proviso does not apply will simply leave the union's coercion subject to an otherwise constitutional prohibition.

Moreover, as this Court observed in *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), "[h]andbilling, like picketing, involves conduct other than speech, namely the physical presence of the person distributing leaflets. . . ." *Id.*, at 315-316. *See Service and Maintenance Employees, Local 399 (Burns Detective Agency), supra* note 24.

CONCLUSION

For the foregoing reasons, Amicus AGC respectfully requests that the decision of the Fourth Circuit in this case be reversed.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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I.

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is a federation consisting of over

[1] The written consents of counsel for all parties have been filed with the Clerk of the Court.

3,700 state and local chambers of commerce, trade, and professional associations and a direct business membership in excess of 245,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's functions involves its representation of its member-employers in important labor relations matters. The Chamber has advanced those interests in a wide spectrum of labor relations litigation before this and other courts. The Chamber appeared as an *amicus curiae* both before the appellate court below and in support of the petition for writ of certiorari, as well as in a related case, *Pet, Inc.* v. *N.L.R.B.*, 641 F. 2d 545 (8th Cir. 1981).

The question presented in this case is a recurrent question of substantial interest to the Chamber's members. That question is whether, despite the producer-distributor restriction contained in the publicity proviso to Section 8(b)(4) of the National Labor Relations Act (the "Act"), 29 U. S. C. § 158(b)(4),[2] a union may engage in a consumer boycott against a neutral secondary employer who, at best, has only a so-called "symbiotic" relationship with the primary employer with whom the union has its dispute.

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[2] The proviso provides:

Provided further. That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing for the purpose of truthfully advising the public, including consumers and members of a labor organization, *that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer,* as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distributions. (emphasis added).

The answer to this question will necessarily exert a significant impact on the rights of many Chamber members and their manner of doing business. Heretofore, unrelated business entities, even where they are associated for mutual benefit, have been protected from the coercive secondary activity which Section 8(b)(4) of the Act was designed to prevent. The new interpretation of the publicity proviso sanctioned by the decision below would now remove that protection. A labor organization would be permitted to enmesh all tenants of a shopping center in its dispute with any one tenant or, as here, even a dispute with a party who is simply doing business with a single tenant. Indeed, the decision below will affect innumerable forms of business relationships which, like the shopping center owner and tenants involved here, also have a shared relationship for limited purposes. These far-reaching consequences will also be affected by the likely acceleration of union boycott activities such as those at issue in this case. For these reasons, the Chamber respectfully requests the Court to consider its views.

II.

STATEMENT OF THE CASE

Briefly summarized, the undisputed facts are as follows: Edward J. DeBartolo Corp. ("DeBartolo") owns a large shopping center located in Tampa, Florida. The shopping center has approximately eighty-five (85) tenants. One of the shopping center's tenants, H. J. Wilson Company, Inc. ("Wilson's"), contracted with High Construction Company ("High"), a building contractor, to construct a new store for Wilson's at the shopping center. High had a labor dispute with the Florida Gulf Coast Building Trades Council, AFL-CIO (the "Union") concerning the alleged payment of substandard union wages and benefits. Instead of directly pressuring High, the Union handbilled at the shopping center's entrances urging a total consumer boycott of both the shopping center and all its tenants until High agreed to the Union's demands.

DeBartolo had no business relationship with Wilson's, aside from the normal lease arrangement characteristic of a large shopping center, and no such nexus at all with High. The other tenants had no business relationship whatsoever with either Wilson's or High. Neither DeBartolo nor the tenants had participated in any way with Wilson's selection of High. They had no control over either the method or means by which Wilson's, let alone High, did business. Nor were DeBartolo or the tenants in any way responsible for the wages and benefits paid by High. Nevertheless, the National Labor Relations Board (the "Board") concluded that the Union's conduct was protected by Section 8(b)(4)'s publicity proviso.

On appeal, a divided Fourth Circuit agreed with the Board. The majority concluded that, while the producer-distributor language of the proviso creates a "relational requirement" (Pet. App., p. 6a), both axes of that test had been satisfied in this case. *Id.* at p. 11a. The Court concluded that inasmuch as High, through its construction of a new store, "add[ed] value" to Wilson's, High *ipso facto* was "a producer of the mall enterprise" since that labor also "added value to that enterprise." *Id.* at p. 7a. Similarly, the Court found that DeBartolo and the other eighty-four shopping center tenants " 'distribut[ed]' . . . Wilson's store and its inventory by attracting shoppers, helping to maintain common areas, and participating in joint advertising." *Id.* at p. 8a. The Court deemed the "distributor" axis satisfied because DeBartolo and the other tenants, "simply by conducting business[,]" were engaged in a "mall enterprise" which, in the Court's view, included Wilson's and, by extension thereof, High's construction work. *Id.* at pp. 8a, 14a.

The foregoing facts are a sufficient predicate for the Chamber's two primary points. *First,* while business entities lacking a reasonably close nexus, even when enjoying a mutually beneficial relationship, have heretofore been insulated from the devastating effects of a secondary boycott by Section

8(b)(4), the decision below now effectively repeals that legislative judgment. Simply because a business is fortuitously located in the same shopping center, or, for that matter, in the same office building, or on the same commercial street, under the decision below, now it may be enmeshed in the labor disputes of other employers, some of whom, indeed, may be its competitors, and with whom it has, at best, a tenuous relationship. *Second,* before this carefully delineated statutory accommodation is upset and unions are accorded unbridled license to disrupt the operations of employers only remotely connected with the underlying controversy, careful judicial consideration of the balance struck by Congress is required. Courts, which are entrusted with reviewing the Board's interpretation, cannot be permitted to abdicate that role simply because, as the court below stated, the Board's view is "rational" or "reasonably defensible." Pet. App., pp. 8a, 12a. No such deference is owed the Board's current view which is neither a contemporaneous view nor a longstanding interpretation of the publicity proviso.

III.

ARGUMENT

A. The "Conducting Business"/"Symbiotic" Test Adopted by the Court Below Upsets the Legislative Determination That Unrelated Businesses Should Be Protected From Secondary Boycotts

1. *Congress Intended to Protect Unrelated Businesses From Secondary Boycotts*

In originally enacting Section 8(B)(4), Congress differentiated between primary labor disputes and impermissible secondary boycotts. Secondary boycotts, where union pressure was placed on one business entity to compel it to cease doing business with another employer with whom a union has a dispute, were deemed unworthy of statutory protection because of their intrusive impact on interstate commerce. In Congress' view, secondary boycotts unduly expanded the area of industrial strife and disrupted the operations of employers only remotely connected with the principal controversy.

In 1959, when it amended the Act's secondary boycott prohibition, Congress sought to clarify its earlier legislation. In so doing, Congress sought to delicately balance the interests of unions to exert economic pressure against a primary employer and those of neutral secondary employers to remain free from that pressure. The legislative compromise was Section 8(b)(4)'s publicity proviso and its producer-distributor test. Within the boundaries of that standard, the 1959 amendments carved out a limited exception for secondary boycotts. At the same time, Congress re-emphasized its earlier intent to preserve the protection accorded those employers who were too remote from the primary labor dispute to justify such coercive conduct.

2. *The Pernicious Effect of the Decision Below*

The decision below effectively nullifies the legislative balance achieved by the 1959 amendments. If High is related to the shopping center enterprise as a "producer," then any other

employer who conducts any business with any tenant is likewise related to the shopping center enterprise as a "producer." As a result, if any one of the multitude of companies that a large national retailer does business with becomes involved in a labor dispute, all other establishments located in any of the numerous shopping centers where that retailer has a facility may then also become embroiled in that controversy. If, for example, a supplier to that retailer, whether it be a supplier of major merchandise or minor services, has any dispute with a union, which, as here, does not even represent its employees, countless other employers who are related only by proximity may be subjected to a crippling consumer boycott notwithstanding that they do business with neither the retailer nor the supplier. The industrial strife that would be occasioned by this approach is staggering. Every business which supplies a single shopping center employer with either supplies, services, fixtures, products for sale, or any other item of value can potentially involve every other employer at that center in a labor dispute. Manufacturers of display counters and lighting fixtures, by selling those items to a particular shopping center tenant, arguably participate in the "mall enterprise" by adding value to the other tenants in the same manner that High did in the instant case. A pharmaceutical company, which sells packets of headache pills for resale to a drugstore located in a shopping center and which becomes involved in a disagreement with a labor organization, can now subject not only that drugstore, but numerous non-drugstores related only by proximity, to the substantial economic impact of a consumer boycott.

Indeed, it does not even matter that, as in this case, some of the boycotted employers may be actual competitors of the primary employer or have no practical control or influence over that employer's personnel. A union is simply left free to randomly choose which employers it may seek to boycott: it may limit its activities to the offending supplier or retailer, extend them to the shopping center owner, involve other center tenants, or appeal to consumers to boycott some or all of the

owners or tenants at other locations where either the supplier or retailer is located. In each of these instances there exists a putative "symbiotic" relationship[3] which, as indicated by the decision below, removes the secondary boycott protection of the producer-distributor limitation to the publicity proviso.

The decision below also can be logically extended to any number and variety of other "shopping center" operations. The phrase "shopping center" is not restricted to a large horizontal center such as that involved in this case. As this Court has recognized, that term can just as readily be applied to a single retail store containing a supermarket and a drug department with adjacent parking spaces for two rows of automobiles. *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223 (1970). There are also a variety of vertical shopping centers, for example, Water Tower Place in Chicago or Quail Springs Mall in Oklahoma City, with many levels both above and below ground. Office buildings where retailers, service establishments, and numerous additional business enterprises may be situated can be similarly classified. The array of shops, restaurants, and other facilities in New York City's Citi-Corp Building and World Trade Center would qualify those facilities as "shopping centers." There are also innumerable industrial parks with a variety of tenants that share a geographic relationship. Many large department stores with leased departments or concessions are likewise characterized by the "symbiotic" or mutually beneficial relationship of a shopping center.

An infinite variety of other business relationships also enjoy a mutually beneficial relationship. In *Pet, supra,* for example, the Board applied its new producer-distributor test to the divisions of a corporate conglomerate even where there was

[3] As used by the decision below, the term "symbiotic" is inappropriate since in this case the necessary intimate and close association required of a symbiotic relationship is absent. The mere sharing of certain interests involving advertising and sanitation services falls far short of creating a "symbiotic" relationship.

no common control, joint work product, or direct business transactions between the corporate divisions of that enterprise. As the petition for certiorari in this case further points out (pp. 10-11), the hodgepodge grouping of business establishments along most commercial streets similarly have a "symbiotic" relationship: each business attracts customers who may frequent the other stores along the street; they may all belong to a merchant association that engages in a variety of promotional and advertising activities intended to increase business; they may all join together to provide for security, sanitation, and other common services; and they may all belong to local chambers of commerce because of a wide variety of shared interests. The same logic would even extend to the many employers who choose to locate their establishments in a business district or resort area; each is seeking to benefit from the presence of, as well as add "value" to, the other, and, as a result, under the decision below, would constitute a common enterprise that would satisfy the producer-distributor requirement of the proviso.

There are, in short, many variations of business relationships which can be characterized as "symbiotic" or which are similarly mutually beneficial. By countenancing the extension of labor disputes to a multitude of employers who lack any real relationship to the primary labor dispute, the decisions below have rendered the producer-distributor limitation a nullity.

3. *The "Producer-Distributor" Standard Requires a Reasonably Close Nexus*

To confine permissible union secondary boycotts within the producer-distributor relationship intended by Congress, that standard cannot, as the Board and court below sanctioned, be open-ended. There must be a reasonably close nexus between the primary employer and the secondary employer. This nexus must include a cognizable chain between a producer and a distributor involving an identifiable product or service of particular utility and applicability to the "distributor." Where

that product or service is of peculiar and singular applicability to only a single distributor, other unrelated entities fall outside that cognizable chain. That chain cannot be identified solely by reference to shared economic interests, acquired mutual benefits, or on the basis of geographic proximity. Absent such a sufficiently close nexus between the primary and secondary employers, Congress' judgment that secondary boycotts impermissibly impose labor strife on neutral employers must be respected.

Judged by the nexus test that the Chamber proposes, the relationship in this case between High, the primary employer, and the secondary employers, DeBartolo and the other eighty-four shopping center tenants, was too attenuated to justify the economic impact of a secondary boycott. High had no contract with either DeBartolo or the other tenants.[4] High's contractual obligations extended only to Wilson's.[5] Nor did High constitute a shopping center tenant, either as a lessee or Wilson's alter-ego. In their alleged business relationship no monies were exchanged between High and either DeBartolo or the other tenants. As for the "mall enterprise" (Pet. App., p. 7a), which the Court of Appeals deemed so crucial, the concentration of retail stores in the shopping center was not designed to aid High's business. High's relationship with DeBartolo and the

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[4] Article XXXIV of the lease between DeBartolo and Wilson's, in defining the "Relationship of Parties" created by their lease, provides that "(n)othing contained in this Lease shall be deemed or construed . . . to create the relationship . . . of joint venture or of any association whatsoever between Lessor and Lessee."

[5] Nor was High a continuing or recurrent "producer" of a product or service that involved a producer-distributor relationship with the shopping center's non-Wilson's tenants. The product produced by High was peculiarly and singularly of utility to Wilson's, the sole owner of the store under construction. Under the rulings of the Board and the Fourth Circuit, those other shopping center tenants could suffer boycott effects *ad infinitum* because of this transitory and one-time relationship between High and Wilson's.

other tenants demonstrated nothing more than autonomous, independent business entities with no entity exercising control over either how the other did business[6] or how that employer conducted its labor relations.

Nor were either DeBartolo or the other tenants in a position to effectively pressure High to abide by the Union's demands. There was no evidence, for example, that either DeBartolo or its tenants, aside from Wilson's, had ever conducted any business with High or otherwise had any type of business relationship with that company. While both DeBartolo and its non-Wilson's tenants were subject to the coercive economic impact of the Union's boycott, they had no practical leverage that could likely affect High's conduct. This absence of an ability to terminate the underlying labor controversy further demonstrates that a nexus sufficient to satisfy the producer-distributor requirement is absent in this case.

While the "producer-distributor" language may arguably not be given "a narrow or literal construction" (Pet. App., p. 10a), by the same token, that language does not encompass all business relationships, or make neutral employers subject to secondary boycotts merely because some item of "value" (*id.* at p. 7a) may be derived from the employer involved in the primary labor dispute. The producer-distributor requirement of the proviso was designed to confine labor disputes to either the primary employer or a secondary employer with a reasonably close nexus to the primary dispute. The unrestricted approach sanctioned by the decision below impermissibly ignores this explicit statutory limitation.

B. Deference to the Board's Interpretation Is Not Warranted

The Board is not free, under the guise of administrative deference, to depart from the proviso's explicit producer-

[6] Article XXV of the lease between Wilson's and DeBartolo requires that DeBartolo permit Wilson's to operate "without any manner of hinderance."

distributor language. If, as the appellate court suggested, the issue is the "construction of a labor statute" (Pet. App., p. 8a), no deference is due the Board's interpretation because the resolution of a "legal issue is one peculiarly reserved for judicial resolution." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 41, n. 27 (1977). The interpretation of the terms "producer-distributor" does not require any agency expertise which, of course, is the primary rationale for the deference doctrine. To the contrary, this matter involves solely the "judicial application of canons of statutory construction." *Barlow* v. *Collins*, 397 U. S. 159, 166 (1970).

Any plea for deference is further vitiated because the Board's new "symbiotic" theory is neither a "contemporaneous interpretation" (*General Electric Co.* v. *Gilbert*, 429 U. S. 125, 142 (1976)) nor a "longstanding" construction. *Southeastern Community College* v. *Davis*, 442 U. S. 397, 411-12, n. 11 (1979). An agency's interpretation carries the "most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." *Zuber* v. *Allen*, 396 U. S. 168, 192 (1969).[7] That contemporaneity is absent here. The "conducting business"/"symbiotic" test now advanced by the Board, which, as interpreted by the appellate court, is tied only to the presence of "a financial interest" (Pet. App., p. 12a) between the primary employer and secondary employer, was never adopted or even proposed by the Board until its decision in *United Steelworkers of America (Pet, Inc.)*, 244 NLRB 96 (1979), *enf. denied*, 641 F. 2d 545 (8th Cir. 1981).

[7] Compare *Udall* v. *Tallman*, 380 U. S. 1, 17 (1965), where the interpretations under scrutiny had been consistently utilized for a significant period of time and had "been a matter of public record and discussion."

IV.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. IN SUPPORT OF PETITIONER

This brief is submitted with the written consent of counsel to the three parties filed with the Clerk of the Court.

Interest of the *Amicus Curiae*

The International Council of Shopping Centers, Inc. (ICSC) is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and all

others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 10,000 members, and the approximately 8,500 located in the United States represent a majority of the shopping centers in this country. The ICSC is the only U.S. trade association specific to shopping centers.

ICSC's members have a clear interest in the disposition of the present case, since the holding of the Fourth Circuit Court of Appeals would permit handbilling urging a consumer boycott of any tenant in a shopping center in the event of a dispute between a labor union and a contractor doing business with an individual tenant. Because this affects the legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry. ICSC respectfully submits this brief to bring to the Court's attention the views and arguments of its members.

Reference is made to the brief of the Petitioner for a statement of the facts of this case and the applicable statutes. This brief will be confined to the aspects of the case specifically related to shopping centers.

ARGUMENT

Neutral employers who have neither a direct economic link with, nor any ability to control, the primary employer are not distributors under the publicity proviso.

POINT I

The Relationship of the Shopping Center Management to the Retail Merchants Within the Center is that of Landlord and Tenant.

Modern shopping centers have their roots in the ancient marketplace. Sellers throughout history have grouped together, frequently among competitors, to attract buyers. They choose locations readily accessible to a large number of potential customers. In early America, this marketplace evolved into the central business district. The advent of the automobile and the population shift to the suburbs led to the location of retail stores in shopping centers with ample parking facilities. The basic principle remains the same as in ancient times that retailers congregate where they are most likely to attract large numbers of customers.[1]

The modern shopping center has evolved into a new kind of enterprise. The court below briefly noted a few characteristics of the contractual arrangements, referred to "the symbiotic nature of the relationship,"[2] and then concluded that this was a producer/distributor relationship within the meaning of the publicity proviso in § 8(b) (4) (i) (ii) (B) of the National Labor Relations Act.[3]

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[1] Carpenter, *Shopping Center Management*, p. 5, ICSC (1978).

[2] Appendix to Petition for Writ of Certiorari at 7a. (All subsequent references to the Appendix are to the Appendix to the Petition for Writ of Certiorari).

[3] 29 *U.S.C.* § 151 *et seq.*

The court's discussion parallels the cursory treatment below by the National Labor Relations Board (the Board) which summarized in one paragraph a few of the lease provisions, noted the interdependency of retailers in attracting customers and concluded that "the symbiotic nature of the relationship"[4] created the producer/distributor relationship required by the publicity proviso of the Act. We respectfully submit that such a sweeping conclusion requires a more detailed analysis.

The relationship of a shopping center manager, such as the Petitioner in this case, to the retail stores is that of landlord (or his agent) to a tenant. That is it in form and substance.[5] The lease defines this relationship: basically, the landlord permits the tenant to occupy the premises for a specific purpose and the tenant pays rent.

The interests of a landlord and a tenant are frequently adverse; therefore, the relationship cannot be termed entirely symbiotic. During the lease negotiations, these divergent interests become apparent in many areas. For example, the landlord wants to maximize the amount of base rent and calculation of percentage rent,[6] while the tenant wants to pay as little as possible. With regard to hours of operation, the landlord wants to remain open as many hours as possible, while the tenant generally wants to limit its hours of operation to its best sales periods. Differen-

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[4] Appendix at 27a-28a. As noted above, this is a characteristic of retail business since ancient times and was the fundamental impetus for the ancient marketplace, the medieval town square, the central business districts of cities, and the modern shopping center. This type of interdependency exists for almost all retail establishments throughout history.

[5] Carpenter, *supra* note 1 at 62.

[6] The court below correctly noted that a shopping center would collect rent from tenants based in part on a percentage of sales. Appendix at 7a.

ces also arise over the provisions dealing with advertising programs and payment of common operating charges.[7]

A tenant is in total control over the operation of its own business. The tenant selects the merchandise to be sold (within the general category of merchandise allowed by the lease), sets prices and establishes its marketing policies and sales procedures.

Certain provisions are contained in shopping center leases for the protection of the tenants whose stores operate in a close proximity to each other; other provisions are included for cost effectiveness. These clauses do not establish a partnership, joint venture or parent-subsidiary relationship among the landlord and tenants of a shopping center.

The Board cited a few of these provisions to support its erroneous finding that a "mutually dependent and beneficial relationship" between the landlord and tenants in the center created a producer/distributor relationship.[8] The tenants' agreement to operate in a way that would not injure the reputation of the center or interfere with the operation of the other tenants is a standard non-disturbance clause found in all types of leases. It is similar to an anti-nuisance provision.

The tenants' obligation to pay a proportionate share of common area costs is simply a way to establish a "net lease" arrangement by removing these costs from the rent calculation.[9] Many individual businesses operating within a certain geographic area share the expenses of cleaning, security and similar items. This type of arrange-

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[7] Carpenter, *supra* note 1, Chap. 4.

[8] Appendix at 27a-28a.

[9] A net lease requires the tenant to pay all the costs of maintaining the building, including taxes, insurance, repairs and other expenses normally required of the owner. Gross, *Encyclopedia of Real Estate Leases*, Prentice-Hall, Inc. (1980).

ment is particularly cost effective in commercial business districts.

The increase in rent when new stores open reflects the increase in the value of the leased premises by virtue of the increased customer traffic. Retail stores in busy areas generally pay higher rent than stores in less busy areas. This economic fact does not establish a single business, especially among competing stores as are generally found in a shopping center where retailers such as shoe stores, clothing stores and department stores typically compete with each other.

Merchants Associations and joint advertising programs exist among merchants located in central business districts as well as those in shopping centers. Chambers of Commerce frequently engage in similar activities. Like other shared expense practices, this kind of association indicates merely a desire to be cost effective.

Percentage rent is a standard provision in shopping center leases to assure both tenants and landlords that total rent accurately reflects the value of the premises. Such a formula ensures that both parties are protected and their needs are met.[10] The landlord is guaranteed sufficient income to meet fixed expenses (including debt service) and receive a reasonable return on his equity investment. The tenant is obligated only to pay a minimum base rent and a percentage of the gross sales above a certain amount, which reflects the value of the leased premises to him. This formula allows the base rent to be lower than would be the case without the percentage rent. Since the measure of percentage rent is gross sales and not net income, the landlord is not interested in the expenses and other matters that concern a joint venture partner. Thus, this formula for measuring the value of

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[10] McKeever, Griffin, *Shopping Center Development Handbook*, p. 132, Urban Land Institute (1977).

the leased premises does not constitute a joint operation of a single business.

The most critical point in the relationship of the Petitioner to its tenant is that the Petitioner had no control over the selection of the contractor involved in this case.[11] The thrust of the opinion of the court below is that Petitioner could "apply pressure on Wilson's and High" with respect to their union controversy.[12] The right to control is a factor which the courts consider when they interpret the provisions of the Act.[13] Since DeBartolo had contracted to permit Wilson's to select the contractor, the court based its decision on DeBartolo's breaching its contract with Wilson's.

POINT II

The Relationship Among the Merchants Within a Shopping Center Is That of Independent Competitors in Geographic Proximity.

The court below held that the mall tenants are within the publicity proviso because 'the tenants help 'distribute' the new Wilson's store and its inventory by attracting shoppers, helping to maintain common areas, and participating in joint advertising.'"[14] The use of the quotation marks on the word "distribute" is recognition of an unorthodox use of the word. The notion that a retailer is a distributor of its competitor's store is indeed a strange contortion of the meaning of the word.

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[11] Appendix at 17a.

[12] Appendix at 13a.

[13] See *N.L.R.B.* v. *Plumbers Local 633 (Austin Co.)*, 429 U.S. 507 (1977); *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973); *N.L.R.B.* v. *International Longshoremen's Assoc.*, 104 L.R.R.M. 2552 (1980).

[14] Appendix at 8a.

The court correctly noted that the Board did not elaborate its reasoning.[15] The court reviewed the cases and then concluded as follows:

> "High produces certain products, i.e., the Wilson's store and the mall enterprise, and those products are in turn distributed by DeBartolo and the mall tenants, all of whom had a financial interest in High's work but had no direct relationship with High."[16]

Neither DeBartolo nor the tenants had a financial interest in High's work. The tenants share the benefits of customer traffic as merchants have done since ancient times; they share expenses for cost effectiveness as do many independent businesses operating in close proximity, but they remain competitors, independently owned and operated, with no financial interrelationship among them as such.[17] The net income of one store has no financial effect on any other store (except in bankruptcy).

To say that customer traffic generates an interrelationship which leads to a "financial interest" produces many strange extensions of the publicity proviso. A convention center is built largely to increase business for the hotels in a city. The hotels are of course interested as a general matter in having the convention center built, but this is not a "financial interest" as that term is understood in the business community and in law. Other unacceptable situations produced by the court's reasoning are discussed in the Petitioner's brief.

The foregoing discussion establishes that the relationship among mall tenants is one of independent competitors in geographic proximity.

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[15] *Id.*

[16] Appendix at 12a.

[17] Two or more stores operating in a mall may have common ownership, but they compete with each other and with the other stores in the mall.

POINT III

These Relationships Do Not Fall Within the Producer/Distributor Exception for Secondary Boycotts Under the National Labor Relations Act.

The cases interpreting the publicity proviso and analyzing the producer/distributor relationship permit handbilling of a secondary employer when the labor union with the primary dispute can trace the product into the hands of those who distribute and sell items made by the allegedly unfair labor. In all these cases there is a direct economic link between the producer with the primary labor dispute and the target of the handbilling, who purchases the product made by the producer.

In this case the product made by High is the Wilson's store. High is not a "producer" of the balance of the East Lake Square Mall, which was already built and operating prior to the lease to Wilson's.[18] To call High a "producer" of the entire mall extends the publicity proviso to the landlord and mall tenants who do not purchase any product of High, directly or indirectly. This absence of a direct economic link makes the decision below an unwarranted extension of the publicity proviso beyond its already extended limits.

The history of this provision began with a series of cases before the National Labor Relations Board. In *Lohman Sales*[19] the targets of the handbills sold items purchased directly from the target of the primary labor dispute. Similarly in *Middle South*[20] the target of the secondary

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[18] Appendix at 16a.

[19] *International Brotherhood of Teamsters, Chauffeurs, Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901 (1961).

[20] *Local 662, Radio & Television Engineers (Middle South Broadcasting Co.)*, 133 N.L.R.B. 1698 (1961).

activity, the advertisers, directly purchased services from the primary employer radio station, i.e. advertising time. Similar facts and the same economic link existed in the *Great Western* case.[21]

The *Shop-Rite* case,[22] the first shopping center case, involved a primary dispute with a refrigeration contractor hired by Shop-Rite, a tenant in the center. Handbills were limited to urging a boycott of Shop-Rite's stores, not those of other tenants in the center. The product, refrigeration equipment, was traced directly to its purchaser, Shop-Rite. Since Shop-Rite was the purchaser, there was both a direct economic link and a right to control the contractor. The same link existed in the *Golden Dawn Foods* case,[23] where the primary dispute was with contractors hired by the owners of the supermarket which was the target of the handbilling.

In *Sakowitz*,[24] another shopping center case, the primary dispute was with the contractor (Hobbs) who constructed the heating, ventilating and air conditioning system (HVAC). Sakowitz was a retail tenant that paid for HVAC services directly to Hobbs and another. Thus the product, the HVAC system, was traced to the user of that system. The court below said that Sakowitz "had no relationship with it (the HVAC subcontractor) except to pay for its services as part of their monthly rent."[25] This is a critical exception because it shows an economic link that is not present in the instant case.

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[21] *American Federation of Television & Radio Artists (Great Western Broadcasters Corp.)*, 150 N.L.R.B. 467 (1964).

[22] *Plumbers and Pipe Fitters, Local 142 (Shop-Rite Foods)*, 133 N.L.R.B. 307 (1961).

[23] *Local 712, IBEW (Golden Dawn Foods)*, 134 N.L.R.B. 712 (1961).

[24] *Local Union No. 54 Sheet Metal Workers (Sakowitz, Inc.)*, 174 N.L.R.B. 362 (1969).

[25] Appendix at 11a-12a.

In the *Castner-Knott* case,[26] the primary dispute was with the contractor constructing a store at a shopping center for Castner-Knott. Again the product, the store, was traced to the purchaser and user of the store. If the *Castner-Knott* analysis were applied to the facts of this case, the product, the retail store, would be traced to the purchaser and user of that store, Wilson's, but not to DeBartolo and the 85 other mall tenants. The facts are clear that DeBartolo and the other mall tenants are not users of the product of High and have no financial relationship with that contractor who has the primary labor dispute.[27] DeBartolo only leased land to Wilson's and does not own or lease the product of High.[28]

The appellate cases on this issue similarly trace the products to the user, requiring a direct economic link between the target of the primary labor dispute and the target of the handbills who purchased the product. This Court's decision in *Servette*[29] established that the publicity proviso was not limited to companies that were technically producers, but in that case there was a direct economic link between the primary employer, the wholesaler, and the secondary employers, the retail stores that bought products from the wholesaler. Similarly, in *Tree Fruits*[30] secondary activity was held valid as long as it was closely confined to the primary dispute.[31] A direct economic link existed between the primary employers with whom the union had a

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[26] *Nashville Building & Construction Trades Council (Castner-Knott Dry Goods Store)*, 188 N.L.R.B. 470 (1971).

[27] Appendix at 22a.

[28] Appendix at 16a.

[29] *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964).

[30] *NLRB* v. *Fruit & Vegetables Local 760 (Tree Fruits)*, 377 U.S. 58 (1964).

[31] *Id.* at 72.

dispute and the secondary employers, the stores that sold the struck products.[32]

The recent decision of the Eighth Circuit in the *Pet* case[33] supports the position of the Petitioner herein. We agree with that court's holding that Hussman was not a "producer" within the meaning of the publicity proviso, because no product of Hussmann's could be traced to the Pet stores which were the targets of the handbills. Nevertheless, we note that even in that case there was a direct economic link that is not present herein. Hussmann was a wholly owned subsidiary of *Pet*. Accordingly, its profits directly affected the net income of the consolidated group. Furthermore, *Pet* had control over Hussmann's activities through the corporate structure, and the fact that it chose as a matter of corporate policy not to exercise that control is not relevant to the legal relationship.

The existence of direct economic linkage required by all previous cases is critical to determine the applicability of the publicity proviso because it establishes an element of control which is essential for the accomplishment of the objectives of the National Labor Relations Act.[34]. No legitimate purpose is served by allowing pressure to be brought on an employer who has no control over the labor dispute.

The record establishes that DeBartolo, and the other tenants of the mall, had no control over the contractor involved in the primary dispute.[35] As noted above, the assertion of

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[32] The *Tree Fruits* case dealt with picketing and did not address handbilling.

[33] *Pet, Inc.* v. *NLRB*, 641 F.2d 545 (8th Cir. 1981).

[34] *See N.L.R.B.* v. *Plumbers Local 633 (Austin Co.)*, 429 U.S. 507 (1977); *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973); *N.L.R.B.* v. *International Longshoremen's Assoc.*, 104 L.R.R.M. 2552 (1980).

[35] Appendix at 22a.

the Court below that DeBartolo could somehow "apply pressure" on Wilson's and High[36] is speculative and amounts to nothing more than urging breach of contract. Certainly it is clear that the mall tenants had no ability to control the selection of a contractor for the Wilson's store. What rights DeBartolo may have with respect to construction by the mall tenants other than Wilson's is not relevant to this case.

The Board's most recently reported discussion of the publicity proviso reflects a sound policy approach. In holding improper a union's handbill which attacked the secondary employer for reasons unrelated to the primary labor dispute, the Board spoke as follows:

> That section (§ 8(b)(4)) was enacted primarily because Congress believed that neutral (secondary) employers should be protected from becoming involved in labor disputes not their own-and similarly that a union's ability to enmesh neutrals in other employers' labor disputes should be limited as much as possible.[37]

The only involvement of DeBartolo and the mall tenants with Wilson's is a sharing of common costs and mutual reliance for the attraction of customers. These arrangements, which are common to many business situations, are not sufficient to constitute DeBartolo and the mall tenants (other than Wilson's) as "distributors" or users of the product of High because DeBartolo and the mall tenants do not buy any product from High directly or indirectly. Hence, there is no direct economic link with the primary employer such as existed in all the cases discussed above.

Furthermore, there is no sound policy reason for extending the publicity proviso to permit a consumer boycott of retail stores that do not make any payments to or receive any payments from, the primary employer and have no control over its labor policies.

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[36] Appendix at 13a.

[37] *Delta Air Lines, Inc.*, 263 N.L.R.B. No. 153 (9/10/82).

Conclusion

For all the foregoing reasons and those set forth by Petitioner, the judgment of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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Docket Sheet

NO. 81-1985-CFX	TITLE	Edward J. DeBARTOLO Corp., Petitioner v. National Labor Relations Board, et al.

DOCKETED	COURT
Apr. 23, 1982	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Lawrence M. Cohen
	Counsel for Respondents: Solicitor General
Apr. 23, 1982	Petition for writ of certiorari filed. (Record filed).
May 25, 1982	Brief, amicus curiae, on behalf of The Chamber of Commerce of The United States of America in support of petition filed.
May 26, 1982	Memorandum for the respondent NLRB filed.
May 26, 1982	Motion of American Retail Federation for leave to file a brief as amicus curiae filed.
May 28, 1982	Memorandum for the Florida Gulf Coast Building Trades Council, AFL-CIO filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 21, 1982	DISTRIBUTED. SL3P1 6-24.
July 15, 1982	Supplemental memorandum for respondent, NLRB filed.
July 15, 1982	Supplemental memorandum for the Florida Gulf Coast Building Trades Council, AFL-CIO, filed.
July 15, 1982	Supplemental memorandum to petition filed.
July 21, 1982	DISTRIBUTED. SL11P1.
Oct. 4, 1982	REDISTRIBUTED. 10-8.
Oct. 12, 1982	The motion of American Retail Federation for leave to file a brief as amicus curiae is GRANTED. Petition GRANTED.

Nov. 19, 1982	Order extending time to file the petitioner's brief on the merits and joint appendix until Dec. 1, 1982.
Nov. 26, 1982	Brief, amicus curiae, of American Retail Federation filed.
Dec. 1, 1982	Brief, amicus curiae, on Behald of The Associated General Contractors of America, Inc. in support of petitioner filed.
Dec. 2, 1982	Brief, amicus curiae, of The International Council of Shopping Centers, Inc. in support of petition filed.
Dec. 3, 1982	Joint appendix filed.
Dec. 3, 1982	Brief for the petitioner filed.
Dec. 6, 1982	Brief, amicus curiae, of the Chamber of Commerce of the United States in support of petitioner filed.

(Over)

81-1985

Title	No.
Dec. 14, 1982 Motion of the Solicitor General for divided argument filed.	

DATE	PROCEEDINGS AND ORDERS
Dec. 21, 1982	Order extending time to file the respondents' brief on the merits until Jan. 20, 1983.
Jan. 10, 1983	The motion of the Solicitor General for divided argument is DENIED.
Jan. 14, 1983	Order extending time to file the respondents' brief on the merits until Jan. 25, 1983.
Jan. 24, 1983	Order further extending time to file the respondents' brief on the merits until Jan. 26, 1983.
Jan. 25, 1982	Brief for the respondent National Labor Relations Board filed.
Jan. 27, 1983	Brief for respondent Florida Gulf Coast Building Trades Council, AFL-CIO filed.
Jan. 31, 1983	Motion of respondent Florida Gulf Coast Building Trades Council, AFL-CIO, for leave to file out of time motion for divided argument filed.
Feb. 15, 1983	CIRCULATED.
Feb. 22, 1983	The motion of respondent Florida Gulf Coast Building Trades Council, AFL-CIO, for leave to file motion for divided argument, out-of-time, is DENIED.
March 15, 1983	Reply brief for the petitioner filed. (D).
March 22, 1983	ARGUED.